Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

E. BARRETT PRETTYMAN, JR.*
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PATRICK M. RAHER
DAVID J. HAYES
CATHERINE JAMES LACROIX
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PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1986
CERTIORARI GRANTED JANUARY 12, 1987

IN THE

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JOINT APPENDIX

TABLE OF CONTENTS

	Page
Docket entries from the United States District Court for the Eastern District of Virginia	1
Docket entries from the United States Court of Appeals for the Fourth Circuit	7
Exhibit 10: Discharge Monitoring Reports for March and May, 1984	11
Exhibit 25: Letter to Joseph Luter from Richard N. Burton, dated March 12, 1984	13
Exhibit 27: Letter to Terence Switzer from Terry L. Retting, dated April 6, 1984	16

TABLE OF CONTENTS—Continued

Page

Exhibit 55: Letter to Tidewater Regional Office, State Water Control Board, from W. James Wells, Jr., dated July 22, 1982, and Concept Engineering Report 17

Exhibit 56: Letter to Kenneth W. Brown, from Henry L. Morris, dated August 12, 1982 28

Exhibit 57: Letter to T. Switzer from Walter H. Voorhies II, dated September 29, 1982 29

Exhibit 60: Memorandum to PBW, JWS from WJW, dated August 26, 1982 31

Exhibit 65: Letter to Henry L. Morris from W. James Wells, Jr., dated February 23, 1983 33

Exhibit 77: Letter to Richard N. Burton from Joseph W. Luter, III, dated March 15, 1984 35

Exhibit 101: State Water Control Board Staff Report dated March 25-26, 1984 42

Findings of Fact and Conclusions of Law, August 28, 1984 56

Order of District Court, August 30, 1984 59

Order of District Court, November 16, 1984 61

Transcript of Proceedings: Testimony of J. Willis Sneed, December 19, 1984 63

Motion to Dismiss for Lack of Jurisdiction, May 16, 1985 69

Memorandum of District Court, June 26, 1985 [corrected copy] 71

Judgment of District Court, June 26, 1985 119

The appendix to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

Appendix A: Opinion of Court of Appeals 1a

Appendix C: Judgment of Court of Appeals 75a

Appendix D: Order of Court of Appeals Denying Petition for Rehearing 77a

Appendix E: Complaint filed June 15, 1984 ..... 79a

Appendix F: Stipulation filed December 17, 1984 ..... 85a

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1984		
June 15	1	Complaint filed. No jury demand.
June 15	—	Summons issued & mailed to atty. for service.
June 22	2	Pltf's Decline to jurisdiction of Magistrate, filed
June 29	3	Pltfs' Statement of Material Facts Not In Dispute In Support For Their Motion For Summary Judgment, filed.
June 29	4	Pltfs' Memorandum of Law, filed.
June 29	5	Affidavit of Jeter M. Watson, filed.
June 29	6	Pltfs Notice of Motion, filed.
July 2	—	Acknowledgement of summons, executed, filed.
July 5	7	Deft's Answer to Complaint, No Jury, filed, with Motion.
July 23	8	Pltfs' Response To Deft's Answer & Motion To Dismiss, filed.

DATE	NR.	PROCEEDINGS
1984		
July 25	9	PTO, Non-Jury, ent'd 7-25-84 (RRMjr) filed. Copies to counsel at PTC.
July 25	10	Motion for Judgment on the Pleadings filed by the Pltf.
Aug. 20	11	Notice of Hearing on August 28, 1984 at 2:00 p.m., Filed.
Aug. 28		IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. DEFT'S MOTION TO DISMISS HEARD; DENIED. PLTFS' MOTION FOR PARTIAL SUMMARY JUDGMENT HEARD; GRANTED. ORDER TO ENTER. (21 Mins.)
Aug. 30	12	ORDER, denying deft's motion to dismiss; denying deft's motion to abstain: pltf's motion for partial summary judgment is GRANTED etc. Ent. by RRM, JR. on 08/30/84 & filed. Cps. mailed.
Sept. 4	13	Deft's Motion for Rehearing, Filed.
Sept. 10	14	Pltfs' Opposition to Deft's Motion For Rehearing, filed.
Oct. 5	—	Transcript of Hearing before Hon. RRM, JR. on 08/28/84 In I Vol., filed.
Oct. 10	15	Pltf's Motion For Expedited Discovery & Expedited Proceedings on the Remedy, filed.
Oct. 16	16	ORDER, that discovery is extended through 12/14/84; Parties to file proposed findings of fact by noon 12/14/84. Deft's motion for rehearing is DENIED. Ent. by RRM, JR. on 10/16/84 & filed. Cps. mailed.
Oct. 16	17	Deft's Answer, filed. No jury demand.

DATE	NR.	PROCEEDINGS
1984		
Oct. 16	18	Deft's Memorandum In Support of Motion For Rehearing, filed.
Oct. 17	19	Pltf's Motion To Set Trial Date, filed.
Oct. 26	20	Deft's Motion For Reconsideration, filed.
Oct. 30	21	ORDER, that the portion of this Court's Order of 10/16/84 denying deft's motion for a rehearing is VACATED. Argument on said motion etc. is scheduled for 11/15/84 at 8:00 A.M. Ent. by RRM,JR. on 10/30/84 & filed. Cps. mailed.
Nov. 5	22	Pltfs' Motion to Strike and Brief in Support, filed.
Nov. 6	23	Pltfs' Status Hearing Memorandum, Filed.
Nov. 16	24	ORDER, that deft's Motion For Rehearing is GRANTED & the Order of 08/30/84 is Amended to Provide that the deft. violated the Federal Water Pollution Control Act, etc. Briefing schedule set. Ent. by RRM,JR. on 11/16/84 & filed. Cps. mailed.
Dec. 16	25	Pltfs' Notice of Deposition of J. Willis Sneed on December 11, 1984, Filed.
Dec. 16	26	Pltfs' Notice of Depositions of Joseph Luter, III, Henry Morris, Terry Rettig & Kenneth Brown, Filed.
Dec. 6	27	Pltfs' Request for Entry Upon Land, Filed.
Dec. 14	28	Pltf's Proposed Findings of Fact & Conclusions of Law, filed.
Dec. 17	29	Parties Stipulation, filed.
Dec. 17	30	Deft's Proposed Findings of Fact & Conclusions of Law, filed. (Exhibits to this are in a brown expandable next to case file)

DATE	NR.	PROCEEDINGS
1984		
Dec. 18	31	Pltfs' Witness List, filed.
Dec. 18	32	Pltfs' Exhibit List, filed.
Dec. 18	33	Deft's Witness List, filed.
Dec. 18	34	Deft's Exhibits List, filed. (Copies of Exhibits attached to this List)
Dec. 18	35	Pltf's Trial Memorandum, filed.
Dec. 19		TRIAL PROCEEDINGS: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR TRIAL ON MERITS. OPENING WAIVED BY THE PLTFS. OPENING MADE BY THE DEFT. PLTF ADDUCED EVIDENCE; RESTED. DEFT ADDUCED EVIDENCE; RESTED. EVIDENCE CONCLUDED. DEFT TO FILE POST-TRIAL BRIEF BY 1-15-85; PLTFS TO RESPOND W/N 7 DAYS THEREAFTER IF THEY DEEM IT NECESSARY. CASE TAKEN UNDER ADVISEMENT. (5 Hrs. 36 Mins.)
1985		
Jan. 11	—	Transcript of Trial Proceedings held on 12/19/84 in I Vol., filed.
Jan. 16	36	Deft's Post-Trial Memorandum, Filed.
Jan. 29	37	Pltfs' Motion For Leave To Amend The Complaint Or In The Alternative Join A Party Deft., filed.
Jan. 29	38	Pltfs' Response To Defts' Post-Trial Memorandum, filed.
Feb. 11	39	ORDER, giving Ralston Purina Co. through 02/25/85 within which to file a response to pltfs' Motion To Amend etc. Ent. by RRM,Jr. on 02/11/85 & filed. Cps. mailed.

DATE	NR.	PROCEEDINGS
1985		
Feb. 25	40	Non-Party Continental Baking Co.'s Memorandum In Opposition to Pltfs' Motion To Amend Their Complaint Or In The Alternative To Join A Party Deft., filed.
Mar. 8	41	ORDER, extending through 03/31/85 the time within which Pltfs' must respond to Continental Baking Co's Memorandum In Opposition to Pltf's Motion To Amend, etc. Ent. by RRM,JR. on 03/08/85 & filed. Cps. mailed.
Apr. 2	42	Pltfs' Reply To Continental Baking Co's, Memorandum In Opposition To Pltfs' Motion To Amend Their Complaint Or In The Alternative To Join A Party Deft., filed.
May 16	43	Deft's Motion To Dismiss For Lack of Jurisdiction, filed.
May 16	44	Deft's Memorandum In Support of Motion To Dismiss for Lack of Jurisdiction, filed.
May 24	45	ORDER that Pltfs have ten (10) days from the date of this Order to file an opposing memorandum, entered by RRM, JR. on 5/24/85 & Filed. Copies Mailed.
May 24	46	Pltf's Memorandum In Opposition To Deft's Motion To Dismiss, filed.
June 6	47	Deft's Reply Memorandum In Support of Motion To Dismiss for Lack of Jurisdiction, filed.
June 26	48	Memorandum of the Court ent. by RRM,JR. on 06/24/85 & filed.
June 26	49	JUDGMENT ORDER, that deft's motion to dismiss is hereby DENIED: Deft., Gwaltney of Smithfield, Ltd., is declared to have been in violation of the Clean Water Act etc.; deft. enjoined until further Order of the Court to provide ptlfs' with a copy of all reports said deft.

DATE	NR.	PROCEEDINGS
1985		
		submits to state or federal government relating to its NPDES permit etc. Deft. shall pay civil penalties in accord with the Court's memorandum in the sum of $1,285,322 with interest from this day forward; counsel for the respective parties shall meet to confer re: atty. fees etc. if they fail to agree appropriate affidavits shall be filed with the
June 26	—	(Cont.) Court no later than 20 days from this date. Ent. by RRM,JR. on 06/26/85 & filed. Cps. mailed.
June 26	50	Pltfs' Application For Atty. Fees & Expenses (with attachments), filed.
July 24	51	Deft's, Gwaltney's, Motion For Extension of Time, filed.
July 25	52	Findings of Fact & Conclusions of Law As Stated From The Bench by Hon. RRM,JR., filed.
July 25	53	Deft's Notice of Appeal, filed. ($70.00 fee pd.)
July 26	54	ORDER, granting deft's motion for extension of time to respond to the application for atty. fees through 08/02/85 ent. by DDW on 07/26/85 & filed. Cps. mailed.
Aug. 9	55	Deft's Answer to Pltf's Application For Costs & Fees, filed.
Aug. 12	56	ORDER, that the time within which deft. may respond to pltf's application for atty. fees is extended through 08/09/85 ent. by RRM,JR. on 08/12/85 & filed. Cps. mailed.
Aug. 21	—	Clerk's Certificate

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC.;
NATURAL RESOURCES DEFENSE,
Appellees,

versus

GWALTNEY OF SMITHFIELD, LTD.,
Appellant.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
08-26-85	Case docketed. ROA filed. bhr
08-27-85	BRIEFING ORDER, filed. A due 10-07-85. Tentative Calendar for December, 1985 session. bhr
08-27-85	ORDER requiring a joint brief per side, filed. bhr.
09-06-85	DISCLOSURE STATEMENT A, Y, filed. bhr
09-06-85	DISCLOSURE STATEMENT E, N, filed. bhr
09-10-85	DISCLOSURE STATEMENT E (Natural Resources), N, filed. bhr
11/7/85	MOTION (K-44) of Friends of Earth, Sierra Club, Student Public Interest Research Group of New Jersey, Connecticut Fund for the Environment and Atlantic States Legal Foundation for leave to file brief amici curiae on behalf of Es, filed (BHR:jm)
11-12-85	MOTION (K-67) of Es to supplement the appendix, filed (BHR:cw)

DATE	FILINGS—PROCEEDINGS
11-12-85	MOTION (K-68) of Es to supplement the record, filed (BHR:cw)
11-13-85	RESPONSE OF A (Gwaltney) in opposition of motion for leave to file amicus brief. filed. bhr
11-19-85	RESPONSE of applicant's of the amicus brief in opposition to A's response, filed. bhr
11-19-85	MOTION (K-100) of A to extend page limitation of reply brief, filed. bhr
11-20-85	RESPONSE OF E (Chesapeake) to motion for filing the amicus brief, filed. bhr
11-20-85	MOTION (K-44) to file amicus brief; A's response in opposition to motion; applicant's response to A's opposition; E's response to amicus motion mailed to JHW. bhr
11-20-85	MOTION (K-100) of A for extending page limitation of reply brief mailed to JHW. bhr
11/21/85	APPELLANT'S OPPOSITION (K-68) to Es' motion supplement the record, filed (BHR:nac)
11/22/85	Transmitted Es' motion to supplement the appendix; Es' motion to supplement the record on appeal; and A's opposition to Es' motion to supplement the record to JHW. (BHR:nac)
12/2/85	ORDER granting motion K-44, filed (BHR:jm) Copy to Troy; Raher-Hayes-LaCroix; Watson; Thornton; Powers; Terris-Black; Unterberger-Ojala; Habicht-Firestone-Shilton-Lees
12/2/85	ORDER granting motions K-67, K-68 & K-100, filed (BHR:jm) Copy to Troy; Raher-Hayes-LaCroix; Watson; Thornton; Powers; Terris-Black; Unterberger-Ojala; Habicht-Firestone-Shilton-Lees
01-08-86	MOTION (A-6) of A to supplement the record, filed. bhr

DATE	FILINGS—PROCEEDINGS
1/13/86	MOTION (A-8) of USA-AC for permission to participate at oral argument, filed (BHR:jm) Transmitted to HLW, DSR, JMS on 1/13/86
01-16-86	RESPONSE (A-6) of amicus curiae, US, to A's motion to supplement the record, filed (DHB:cw)
01-16-86	RESPONSE of E to A's motion to supplement the record, filed (DHB:cw)
01-21-86	RESPONSE of amici curiae, Friends of the Earth, etc. to motion to supplement the record, filed (DHB:cw)
01-21-86	Transmitted A's motion to supplement the record (A-6); response of the amicus curiae, US to motion A-6; E's response to motion A-6 and response of amici curiae, Friends of the Earth, etc. to HLW, DSR and JMS.
01-21-86	RESPONSE to motion (A-8) of Amicus, US, to participate in argument, filed (Five minutes ceded by Es), (DHB:cw)
1/27/86	REPLY to CBF's opposition to Gwaltney's motion to supplement the record, filed (BHR:jm) Transmitted to HLW, DSR, JSM on 1/27.
01-29-86	ORDER granting A's motion to supplement the record, filed (BHR:cw) Copy of order sent to Troy; Raher-Hayes-LaCroix; Watson; Thornton; Powers; Unterberger-Ojala; Terris-Black and Lees.
1/21/86	Letter to counsel (A-8) advising amicus may argue if ceded 5 minutes from counsel (BHR:jm)
06/05/86	PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC /(A-151 of A, filed (SAR:cw) Transmitted to HLW, DSR, JMS with copies to circuit judges on 06/06/86.

DATE	FILINGS—PROCEEDINGS
6/5/86	MOTION (A-152) of Es for attorney fees and expenses, filed. jd
6/25/86	ORDER denying petition A-151, filed (SAR:jm) Copy to all counsel of record
06/13/86	LETTER from E's counsel, Watson, with attachments, filed (SAR:cw)
06/30/86	RESPONSE of A to motion for attorney fees and expenses, filed (SAR:cw)
07/03/86	Transmitted Es' motion for attorney fees and expenses, with attachments; letter from E's counsel, with attachments; A's response to motion for attorney fees and expenses to HLW; DSR and JMS.
07/03/86	MOTION (A-182) of A for stay of mandate, filed (SAR:cw) Transmitted to HLW; DSR and JMS along with the above transmittal.
7/9/86	REPLY of E's (A-152) to A's response to motion for attorney fees and expenses, filed. BMM:cb
7/10/86	TRANSMITTED E's reply to HLW, DSR, JMS, BMM:cb
8/5/86	ORDER that the motion for attorney's fees and expenses is referred to the d/ct. for decision; this court granted stay of mandate pending A's timely application to U.S.S.Ct. for a writ of certiorari, filed. SAR:gac (See order further explanation)
8/5/86	ORDER that the mandate in this case be, and is hereby, stayed pending timely application of the A to the S.Ct. of U.S. for writ of certiorari, filed. SAR:gac Copies of both orders of 8/5/86 to Counsel of Record.

COMMONWEALTH OF VIRGIN

NATIONAL POLLUTANT DISCH
DISCHARGE MONI

PERMITTEE NAME/ADDRESS (INCLUDE FACILITY NAME/LOCATION IF DIFFERENT)

NAME ITT GWALTNEY, INC

ADDRESS

SMITHFIELD VA 23430

FACILITY LOCATION

FILE NO. 22-2240.

PARAMETER		QUANTITY OR LOADING		
		AVERAGE	MAXIMUM	UNITS
001 FLOW	REPORTED	1,068	1,438	MGD
	PERMIT REQUIREMENT			
002 PH	REPORTED	**********	**********	
	PERMIT REQUIREMENT	**********	**********	
003 BOD5	REPORTED	39.4	89.0	KG/D
	PERMIT REQUIREMENT	174.0000	347.0000	
004 TOTAL SUS. SOLIDS	REPORTED	157.1	236.9	KG/D
	PERMIT REQUIREMENT	228.0000	455.0000	
005 TOTAL CL2	REPORTED	**********	**********	
	PERMIT REQUIREMENT	**********	**********	
006 FECAL COLIFORM	REPORTED	**********	**********	
	PERMIT REQUIREMENT	**********	**********	
069 TKN (N-KJEL)	REPORTED	123.0	220.5	KG/D
	PERMIT REQUIREMENT	109.0000	219.0000	
500 OIL & GREASE	REPORTED	4.8	16.1	KG/D
	PERMIT REQUIREMENT	78.0000	156.0000	

ADDITIONAL PERMIT REQUIREMENTS OR COMMENTS

BYPASSES AND OVERFLOWS	TOTAL OCCURRENCES	TOTAL FLOW (M.G.)	TOTAL BOD5 (K G)
	-	-	-

Terry L. Ret

TYPED OR PRINT

PRINCIPAL EXE

I CERTIFY UNDER PENALTY OF LAW THAT I HAVE PERSONALLY EXAMINED AND AM FAMILIAR WITH THE INFORMATION SUBMITTED IN THIS DOCUMENT AND ALL ATTACHMENTS AND THAT, BASED ON MY INQUIRY OF THOSE INDIVIDUALS IMMEDIATELY RESPONSIBLE FOR OBTAINING THE INFORMATION I BELIEVE THE SUBMITTED INFORMATION IS TRUE, ACCURATE AND COMPLETE. I AM AWARE THAT THERE ARE SIGNIFICANT PENALTIES FOR SUBMITTING FALSE INFORMATION, INCLUDING THE POSSIBILITY

Henry T. Mar

EXHIBIT 10

A STATE WATER CONTROL BOARD
INDUSTRIAL MAJOR 07/14/81
STATE WATER CONTROL BOARD (REGIONAL OFFICE)

VA0002844 (PERMIT NUMBER) 001 (DISCHARGE NUMBER)

TIDEWATER REGIONAL OFFICE
287 PEMBROKE OFF. PARK
SUITE 310 PEMBROKE 2
VIRGINIA BEACH, VA. 23462

MONITORING PERIOD
FROM YEAR 84 MO 5 DAY 1 TO YEAR 84 MO 5 DAY 31

NOTE: Read instructions before completing this form.

QUALITY OR CONCENTRATION				NO. EX	FREQUENCY OF ANALYSIS	SAMPLE TYPE
MINIMUM	AVERAGE	MAXIMUM	UNITS			
				0	Cont	Rec
					CONT	REC
6.9		7.6		0	3 D/W	Grab
6.0000		8.5000	SU		3 D/W	GRAB
				0	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	24 HC
					3 D/W	24HC
1.5		2.50		0	1/M	Grab
1.5000		2.5000	MG/L		1/M	GRAB
	2.1	20.0		0	3 D/W	Grab
	200.0000	400.0000	N/CML		3 D/W	GRAB
				2	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	Grab
					3 D/W	GRAB

OPERATOR IN RESPONSIBLE CHARGE			DATE		
ig		000435	84	6	8
D NAME	SIGNATURE	CERTIFICATE NO.	YEAR	MO	DAY
UTIVE OFFICER OR AUTHORIZED AGENT		TELEPHONE	DATE		
ig		804 | 357-4321	84	6	8

COMMONWEALTH OF VIRGINIA STAT

NATIONAL POLLUTANT DISCHARGE ELIMI
DISCHARGE MONITORING R

PERMITTEE NAME/ADDRESS (INCLUDE FACILITY NAME/LOCATION IF DIFFERENT)

NAME ITT GWALTNEY, INC

ADDRESS

SMITHFIELD VA 23430

FACILITY LOCATION

FILE NO. 22-2240. FROM

PARAMETER		QUANTITY OR LOADING		UNITS	QUALITY
		AVERAGE	MAXIMUM		MINI
001 FLOW	REPORTED	1.01	1.390	MGD	*****
	PERMIT REQUIREMENT				*****
002 PH	REPORTED	**********	**********		7
	PERMIT REQUIREMENT	**********	**********		6
003 BOD5	REPORTED	46.9	88.5	KG/D	*****
	PERMIT REQUIREMENT	174.0000	347.0000		*****
004 TOTAL SUS.SOLIDS	REPORTED	137.2	283.2	KG/D	*****
	PERMIT REQUIREMENT	228.0000	455.0000		*****
005 TOTAL CL2	REPORTED	**********	**********		1
	PERMIT REQUIREMENT	**********	**********		
006 FECAL COLIFORM	REPORTED	**********	**********		*****
	PERMIT REQUIREMENT	**********	**********		*****
068 TKN (N-KJEL)	REPORTED	145.3	217.6	KG/D	*****
	PERMIT REQUIREMENT	109.0000	219.0000		*****
500 OIL & GREASE	REPORTED	9.3	43.4	KG/D	*****
	PERMIT REQUIREMENT	78.0000	156.0000		*****

ADDITIONAL PERMIT REQUIREMENTS OR COMMENTS

BYPASSES AND OVERFLOWS	TOTAL OCCURRENCES	TOTAL FLOW (M.G.)	TOTAL BOD5 (KG)
	-	-	-

Terry L. Rettig

TYPED OR PRINTED NAM

PRINCIPAL EXECUTIVE

Henry L. Morris

I CERTIFY UNDER PENALTY OF LAW THAT I HAVE PERSONALLY EXAMINED AND AM FAMILIAR WITH THE INFORMATION SUBMITTED IN THIS DOCUMENT AND ALL ATTACHMENTS AND THAT BASED ON MY INQUIRY OF THOSE INDIVIDUALS IMMEDIATELY RESPONSIBLE FOR OBTAINING THE INFORMATION I BELIEVE THE SUBMITTED INFORMATION IS TRUE, ACCURATE AND COMPLETE. I AM AWARE THAT THERE ARE SIGNIFICANT PENALTIES FOR SUBMITTING FALSE INFORMATION, INCLUDING THE POSSIBILITY OF FINE AND IMPRISONMENT. SEE 18 U.S.C. § 1001 AND 33 U.S.C. § 1319. [illegible]

WATER CONTROL BOARD
INDUSTRIAL MAJOR 07/14/81
STATE WATER CONTROL BOARD (REGIONAL OFFICE)

A0002R44 (PERMIT NUMBER) | 001 (DISCHARGE NUMBER)

TIDEWATER REGIONAL OFFICE
287 PEMBROKE OFF. PARK
SUITE 310 PEMBROKE 2
VIRGINIA BEACH, VA. 23462

MONITORING PERIOD: YEAR 84 MO 3 DAY 1 TO YEAR 84 MO 3 DAY 31

NOTE: READ ITEMS 12 AND GENERAL INSTRUCTIONS BEFORE COMPLETING THIS FORM.

CONCENTRATION				NO. EX	FREQUENCY OF ANALYSIS	SAMPLE TYPE
UM	AVERAGE	MAXIMUM	UNITS			
				0	Cont	Rec
					CONT	REC
3		8.0		0	3 D/W	Grab
.0000		8.5000	SU		3 D/W	GRAB
				0	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	24 HC
					3 D/W	24HC
50		2.50		0	1/H	Grab
.5000		2.5000	MG/L		1/H	GRAB
	5.8	160.0		0	3 D/W	Grab
	200.0000	400.0000	N/CML		3 D/W	GRAB
				0	3 D/W	24 HC
					3 D/W	24HC
				0	3 D/W	Grab
					3 D/W	GRAB

OPERATOR IN RESPONSIBLE CHARGE			DATE		
	000435		84	4	6
SIGNATURE	CERTIFICATE NO.		YEAR	MO	DAY
OFFICER OR AUTHORIZED AGENT	TELEPHONE		DATE		
	804	357-4321	84	4	6
	AREA	NUMBER	YEAR	MO	DAY

EXHIBIT 25

[SEAL]

COMMONWEALTH OF VIRGINIA
STATE WATER CONTROL BOARD
2111 Hamilton Street

[Mar. 12, 1984]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P33 0329995

Mr. Joseph Luter
Chairman of the Board
Smithfield Foods, Inc.
P.O. Box 447
Smithfield, Virginia 23430

Dear Mr. Luter:

Gwaltney of Smithfield, Ltd., has violated Total Kjeldahl Nitrogen (TKN) effluent limits in its NPDES Permit for some time. Since Smithfield Foods assumed ownership of the Company, the limit was violated five months in 1982 and in January through May 1983. TKN violations recurred in September 1983 and have continued since that time.

The staff requested plans and a schedule to address the TKN violations in the spring of 1982.

In August, 1982, the company submitted a preliminary concept engineering report prepared by your consultant. This was, however, followed by an actual proposal from the company that differed in several important aspects from the consultant's report. After several requests for additional data from the staff, the Company submitted a final concept report in January, 1983. This final report substantially revised the Company's proposal.

The Executive Director approved the final report in May 1983 and requested an implementation schedule.

The Company submitted a schedule that called for beginning construction in June, completing construction in August, and meeting limits in early October, 1983. Although the staff had verbally requested monthly status reports on the construction from the company, no report was submitted until August 26 after a written staff request. This report showed that the schedule was not being met and the Company would be unable to meet the date for completing construction.

The planned modifications to the treatment system were completed in November, 1983. However, due to remedial work at Smithfield Food's Smithfield Packing Company, a major upset occurred in Gwaltney's treatment system just as the newly modified system was being brought on line.

The remedial program at Smithfield called for pumping sludge from the treatment facility to an abandoned anaerobic lagoon at Gwaltney and for excess liquid to go through the Gwaltney treatment system. While this plan was being carried out, a period of heavy rainfall occurred. No flow control capability had been installed within the Gwaltney system to control flows between the abandoned lagoons and the newly modified system. Gwaltney's effluent pumps could not handle the added flows from Smithfield and from the rainfall. Water levels rose through the Gwaltney system, causing hydraulic overloading.

What is particularly disturbing to the staff is that pumping from the Smithfield facility continued instead of being curtailed or stopped soon enough to avoid an upset to the Gwaltney system.

Despite the company's schedule calling for compliance in October 1983, the facility continues to violate its permit.

We have been unsuccessful in our efforts to bring the facility into compliance for such a long period that we intend to discuss this matter with our Board at its March meeting. The Board may have questions of the Company and may discuss possible legal action for the violations so you may wish to be present during the staff's presentation to the Board in this matter.

The staff's report is scheduled for March 26 at 9:00 a.m. or as soon thereafter as possible depending on other matters that are on the agenda. The Board's meeting will be in Senate Room B, General Assembly Building, 9th and Broad Streets in Richmond.

If you have any questions concerning the Board meeting, please contact Anne Field in our Bureau of Enforcement (804/257-6?55).

Sincerely,

/s/ Richard N. Burton
RICHARD N. BURTON
Executive Director

/dd

Copies: Tidewater Regional Office, SWCB
Bureau of Applied Technology, SWCB
Bureau of Enforcement, SWCB
Attorney General's Office

EXHIBIT 27

[LOGO]

SMITHFIELD FOODS, INC.
P.O. Box 447
Smithfield, Virginia 23430
(804) 357-4321

April 6, 1984

Mr. Terence Switzer
State Water Control Board
Tidewater Regional Office
287 Pembroke Office Park
Suite 310, Pembroke II
Virginia Beach, Virginia 23462

Re: *Permit Number VA 0002844*

Dear Mr. Switzer:

This is to inform you that we have met all of our permit requirements for the month of March, 1984. The only parameter that we fell short in was the TKN monthly average. Our permit requires a 109 Kg/d average while we obtained a 145.3 Kg/d average. I attribute this to the high rainfall which increased our effluent flows.

Sincerely,

/s/ Terry L. Rettig
TERRY L. RETTIG
Wastewater Systems Manager

/eb

EXHIBIT 55

[LOGO]

WELLS ENGINEERING, INC.
11237 Chicago Circle
Omaha, Nebraska 68154
(402) 330-0202

July 22, 1982

Re: Gwaltney of Smithfield
Smithfield, Virginia
WE #820602

Tidewater Regional Office
State Water Control Board
287 Pembroke Office Park
Suite 310, Pembroke 2
Virginia Beach, Virginia 23462

Gentlemen:

Transmitted herewith are three copies of the Concept Engineering Report for the referenced project. This report contains adequate information to support the concept for the proposed interim and permanent modifications to the existing waste treatment facilities and we request approval of this document.

Very truly yours,

WELLS ENGINEERS, INC.

/s/ W. James Wells, Jr.
W. JAMES WELLS, JR., P.E.
President

WJW:jlk

Encls.

CONCEPT ENGINEERING REPORT

MODIFICATIONS TO
WASTE TREATMENT FACILITIES

GWALTNEY OF SMITHFIELD, LTD
SMITHFIELD, VIRGINIA

PREPARED BY:

WELLS ENGINEERS, INC.
11237 CHICAGO CIRCLE
OMAHA, NEBRASKA 68154
402/330-0202

COMMISSION NO. 820602

JULY, 1982

[SEAL]

CONCEPT ENGINEERING REPORT

MODIFICATIONS TO WASTE TREATMENT FACILITIES

INDEX

		Page
	LETTER OF SUBMITTAL	i
I.	INTRODUCTION	1
II.	WASTEWATER SOURCES	1
III.	EXISTING WASTE TREATMENT FACILITIES	2
IV.	WASTEWATER CHARACTERISTICS	4
V.	TREATMENT DESIGN PARAMETERS	7
VI.	EFFLUENT LIMITATIONS	8
VII.	DESIGN APPROACH AND METHODS	9
VIII.	COSTS	14
	APPENDIX	

CONCEPT ENGINEERING REPORT

MODIFICATIONS TO WASTE TREATMENT FACILITIES

GWALTNEY OF SMITHFIELD, LTD. SMITHFIELD, VIRGINIA

I. INTRODUCTION

The purpose of this report is to describe modifications to the existing waste treatment facilities which are required to meet the requirements of the discharge on an interim basis and on a permanent basis. The existing treatment facilities experience difficulties meeting the TKN limitations during cold weather and suspended solids limits during warm weather. The scope of the report includes a description of plant operation, existing pretreatment and waste treatment facilities, presentation of sampling and operating data, effluent limitations and design criteria, discussion of an interim and permanent solutions, and cost estimates for construction, as well as additional annual operation and maintenance expenses.

II. WASTEWATER SOURCES

The Gwaltney plant at Smithfield, in southeast Virginia, is a hog slaughtering and processing facility. The present daily kill is approximately 4500 hogs per day at about 230 lb/hog. The kill and cut are one shift operations five days/week, while processing is a two shift operation five or six days/week. All hogs slaughtered at this plant are boned and fabricated into prepared meat products including weiners, sausages, luncheon meat and country hams. Some beef trimmings are brought in for incorporation into the processed meat products.

* * * *

VII. DESIGN APPROACH AND METHODS

Both interim and permanent solutions to the problem of meeting the requirements of the discharge permit have been evaluated and will be discussed in this section. In both cases, after pretreatment, effluent from the packing plant will be directed to Anaerobic Lagoon No. 1. With an estimated volume of 6.75 million gallons, this anaerobic will have an organic loading of 17.5 lb BOD/1000 ft^3/day and a detention time of nearly one week, both very acceptable values. The design effluent from this lagoon is furnished in Section V of this report and is far more conservative than actual performance achieved during the sampling program.

A. *Interim Solution*

In this case, a new Anaerobic Effluent Control Structure will be constructed. This structure will include simple provisions to partially equalize the flow. This will be accomplished by allowing the water level in the anaerobic lagoon to rise and fall throughout the week. Flow will be directed from this structure through a new gravity line to the northern half of the last lagoon (settling pond).

The northern half of the final lagoon will be utilized as an aeration basin. A floating baffle wall will be used to segregate the new aeration basin portion from the remainder of the lagoon. This baffle wall will be anchored on both sides of the lagoon and consists of a reinforced Hypalon or vinyl-type fabric, weighted on the bottom with a chain and suspended from foam floats.

The nine existing 25-Hp floating surface aerators will be relocated to this aeration basin and will provide aeration capacity for BOD reduction and nitrification of ammonia. These aerators will also serve to maintain mixed liquor suspended solids (MLSS) in suspension.

With an aeration volume of 2.75 million gallons and an equalized influent flow of one million gallons per day, the detention time would be 2.75 days. However, significant amounts of storm water runoff enters the various lagoons so flows will occasionally be as high as 2.3 mgd, resulting in a detention time of 1.2 days. Solids retention times of 15 days or longer (MLSS levels greater than 1400 mg/l) will result in good ammonia nitrification, as long as the aeration basin mixed liquor temperatures remain above 10°C. Nitrification may be inhibited by wastewater temperatures below 10°C which can occur during severe winter conditions. Also, the variable flow rate due to storm water runoff will increase the difficulty of operating this activated sludge system.

Theoretically, 7.2 pounds of alkalinity are required per pound of ammonia nitrified. This results in a maximum alkalinity requirement of 9144 lb/day. Approximately 7250 lb/day of alkalinity are available in the anaerobic effluent, indicating the pH may be depressed by nitrification which would inhibit further nitrification. However, alkalinity in amounts less than the theoretical requirement have often proved sufficient. This is due to several reasons: 1) some denitrification of the nitrified flow occurs which returns half of the alkalinity to the system and 2) some nitrogen is bound up with the waste activated sludge and is removed from the system. Consequently, no provisions are proposed for the addition of alkalinity. If pH depression and nitrification inhibition does occur, lime can be added manually with the relatively small amounts that would be required.

After aeration, the two existing self-priming pumps will pump the flow to the two existing final clarifiers. Based on the peak projected flow rate of 2.3 mgd, the surface overflow rate of these clarifiers will be 585 gpd/ft^2 and the weir overflow rate will be 7,615 gpd/ft, both acceptable values.

Sludge settling in the final clarifiers will be directed to the existing sludge pumping station and either be returned to the influent end of the aeration basin through a new line or wasted to the existing sludge lagoon through the present line.

Treated effluent will be pumped to the existing chlorination facilities for disinfection and discharged through the outfall line to the Pagan River.

B. *Permanent Solution*

In this case, the two existing self-priming pumps will be relocated and used to pump effluent from the anaerobic at a constant rate of approximately 700 gpm. To achieve this equalized flow rate, the level in the anaerobic lagoon will be allowed to rise and fall throughout the week. Anaerobic effluent will be pumped to a new Aeration Basin Splitter Structure which will equally divide the flow between two new aeration basins.

The new aeration basins will be constructed northeast of the existing final clarifiers. Each concrete basin will hold 0.75 mgd for a total retention time of 1.5 days at 1.0 mgd. Both basins will be constructed with vertical and sloped sides and have a depth varying from 3.5 feet at the sidewall to 15 at the bottom.

A maximum of 450 lb/hr of oxygen will be required for BOD reduction and ammonia nitrification. Aeration will be provided by either fine-bubble dome diffusers or possibly with a jet aeration system.

With a solids retention time of 15 days or greater, nearly complete nitrification will be achieved at MLSS levels greater than 2500 mg/l. With a relatively small surface area and a subsurface aeration system, mixed liquor temperatures will be maintained above 10°C so nitrification will not be inhibited, even during severe winter weather. Also, construction of the new aeration basins will eliminate wide flow variations due to storm water runoff.

As discussed previously, if alkalinity addition proves necessary, small amounts of bagged hydrated lime can be added manually.

After aeration, the flow will enter a new Clarifier Splitter Structure which will equally divide the flow between the two existing final clarifiers.

At an equalized flow rate of 1.0 mgd, the surface overflow rate of both clarifiers will be 255 gpd/ft^2 and the weir overflow rate will be 3310 gpd/ft, both low values. However, with an 8.5 ft side water depth and without surface skimmers and rapid sludge drawoff mechanisms, these clarifiers are not of an optimum design for a nitrifying activated sludge system.

Settled sludge will either be returned to the splitter structure ahead of the activated sludge system or wasted to the existing sludge lagoon.

Clarified effluent will be pumped to the existing chlorine contact chamber for disinfection prior to discharge to the Pagan River.

C. *Discussion and Recommendations*

There are several unknowns involved with the proposed solutions:

1) Will wastewater temperatures drop below 10°C if surface aerators are used in half of the settling lagoon?

2) How will storm water runoff impact the operation of an activated sludge system utilizing half of the existing lagoon?

3) Is adequate alkalinity available?

4) Are the existing final clarifiers adequate for an activated sludge system designed to nitrify?

If the modifications proposed for the interim solution are implemented and it is then discovered that the permanent

modifications are required, the only interim items which will not be incorporated into the permanent solution are the floating baffle wall and small amounts of piping and electrical.

It is recommended that the interim solution be implemented and operated at least through one winter to resolve the previous questions and to determine if the permanent modifications are required. If the interim solution proves capable of meeting the required effluent limitations, the permanent modifications may not be needed.

VIII. COSTS

This section of the report includes project cost estimates for the proposed modifications to the existing waste treatment facilities, as well as annual operation and maintenance cost estimated. Contingency costs are included to cover unknowns in construction caused by problems discovered during construction and are not assumed to cover rising costs. Included are estimated construction costs for the 1982 construction season; if construction is delayed beyond this time, costs should be increased to allow for inflation.

GWALTNEY OF SMITHFIELD
SMITHFIELD, VIRGINIA

INTERIM WASTE TREATMENT MODIFICATIONS
ESTIMATED CONSTRUCTION COSTS

1.	New Anaerobic Effluent Control Structure	$ 6,000
2.	New Pipeline from Existing Anaerobic Lagoon No. 1 to the New Aerated Cell	10,000
3.	Floating Baffle Wall for Segregating the Aerated Cell	15,000
4.	Relocate Nine 25-Hp Floating Surface Aerators to New Aerated Cell with New Anchor Cables	5,000
5.	Slope Protection	4,000
6.	New Return Activated Sludge Line and Sludge Wasting Valves	7,000
7.	Sitework (reseeding areas disturbed by construction)	1,000
	Total	$48,000
	Contingencies	5,000
	TOTAL ESTIMATED CONSTRUCTION COST WITHOUT ELECTRICAL	$53,000

ADDITIONAL ANNUAL OPERATION AND MAINTENANCE COST

1.	Labor - One Additional Laboratory Person at a Salary of $14,000/Year	$17,500
2.	Maintenance	0
3.	Electrical	0
	ESTIMATED TOTAL	$17,500

GWALTNEY OF SMITHFIELD
SMITHFIELD, VIRGINIA

PERMANENT WASTE TREATMENT MODIFICATIONS
ESTIMATED CONSTRUCTION COSTS

1. Anaerobic Effluent Pumping Station Utilizing Existing Gorman Rupp Pumps	$ 15,000
2. Aeration Basin Splitter Structure	7,000
3. Aeration Basins (2)	165,000
4. Aeration System and Centrifugal Blowers	155,000
5. Blower Building	22,500
6. New Clarifier Splitter Structure	7,000
7. Piping, Valves and Manholes	70,000
8. Sitework (Sidewalks, Gravel Roads and Seeding)	12,000
9. Electrical and Mechanical	30,000
Total	$423,500
Contingencies	42,500
Total Estimated Construction Cost	$466,000
Engineering, Surveying and Soils Analyses	40,000
TOTAL ESTIMATED PROJECT COST	$506,000

REDUCED ANNUAL OPERATION AND
MAINTENANCE COST

1. Labor - One Additional Laboratory Person at a Salary of $14,000/Year	$ 17,500
2. Maintenance - Probably Less than at Present	—
3. Electrical - 75 Hp Less Due to More Efficient Seration System @ 4¢/kwhr	—26,300
ESTIMATED SAVINGS	$ 8,800

EXHIBIT 56

[LOGO] Telex 82-3648

Smithfield Packing Company, Inc.
P.O. Box 447
Smithfield, Virginia 23430
(804) 357-4321

August 12, 1982

Mr. Kenneth W. Brown
President
Gwaltney of Smithfield, Ltd.
Smithfield, Virginia 23430

Dear Ken:

After reviewing the Concept Engineering Report by Wells Engineers, Inc., and after extensive discussion with Sharon City, it is my opinion that you should take the advice of the proposal and put into action an interim solution proposed by Wells. Gwaltney's wastewater facility in its existing state is severely experiencing TKN problems in the cooler months and intermitten suspended solids problems. The State Water Control Board Compliance Division has indicated that steps must be taken to solve these problems. It is my opinion that unless some action is taken your system will continue to violate permit limitations and you could experience enforcement action from the state compliance group.

I have attached the Wells Engineers bill for the engineering services provided in making the recommendations for you to pay. Also attached is a drawing to supplement your copy of the Wells report.

Sincerely,

/s/ Henry L. Morris
HENRY L. MORRIS
Vice President/Engineering

/eb
cc: JWL

EXHIBIT 57

[LOGO]

GWALTNEY OF SMITHFIELD
Smithfield, Virginia 23430
(804) 357-3131

September 29, 1982

Mr. T. Switzer
State Water Control Board
Pembroke Building #2
Suite 138
Virginia Beach, VA 23462

Dear Mr. Switzer:

As per our discussion on 9/24/82, I am enclosing the detail for alterations to our current treatment system at Gwaltney of Smithfield, LTD. Your office is currently studying the Wells Engineering recommendations for altering the system. However, we wish to make the modifications as outlined in the attached drawings. The changes we propose will accomplish the same goals as outlined by Wells with much less expenditure of time and money.

Wells' Modification

1. Discontinue use of present aerobic lagoon.
2. Divide the current final pond with a floating poly curtain, thus creating two smaller ponds; one anaerobic and one to be aerated.
3. Relocate nine-25 H.P. aerators into new aeration cell.

Gwaltney's Modification

1. Convert present aerobic lagoon to anaerobic.
2. Relocate aerators into current final pond to create aerated lagoon.

3. Install chemical pumps and tanks on clarifiers to improve efficiency.

We feel that the additional anaerobic lagoon will increase denitrification. Also, the reduction in size of the aerated lagoon should decrease B.O.D.'s and help maintain temperature control. The addition of chemicals to the clarifiers will greatly improve reduction of solids content. The current chlorination system has been upgraded with baffles in the mixing tank and an automatic feed system.

We feel that these modifications will allow us to remain within our permit perimeters.

Sincerely yours,

GWALTNEY OF SMITHFIELD, LTD.

/s/ W. H. Voorhies
WALTER H. VOORHIES II
Manager of Quality Control

WHV:lrl

cc: A. Devine
D. Robinson
R. Hogue

EXHIBIT 60

[LOGO]

MEMO:

WELLS ENGINEERS, INC.

To: PBW, JWS

From: WJW

Reference: Gwaltney of Smithfield, Ltd., WE # 820602

Date: August 26, 1982

I received a call from Sharon City stating that they had not received a reply to the study and report on the referenced project from the State of Virginia.

She went on to say that the president of Gwaltney of Smithfield, Ltd. has made the decision to make the waste treatment operation of Gwaltney of Smithfield totally independent from Smithfield Packing Company. They have purchased equipment to set up their own waste treatment laboratory and have hired a new Class II operator and they do not wish to have Sharon City involved in the operation of their plant any longer. Further, they do not plan to implement the recommendations outlined in our report and believe that they can handle the problems themselves without any help.

Sharon told them that the high TKN values were the big problem and no amount of chemical addition will solve that problem. They plan to add alum to control the suspended solids problem and the high chlorine demand problem.

Ultimately, Mr. Luter may end up deciding not to go along with their desire to run an independent waste treatment operation if the State of Virginia assesses fines and penalties for noncompliance due to high TKN values.

Sharon City's boss, Henry Morris said he told Gwaltney of Smithfield to look very carefully at our report. His

recommendation is that they implement the temporary alternative as the most cost effective way of dealing with the high algae problem and high TKN problem

Ultimately Mr. Luter will have to decide what to do about the waste treatment system at Gwaltney of Smithfield based upon the reaction of the State of Virginia concerning our report and concerning fines if there are TKN violations, which there most assuredly will be in the winter.

In the meantime, Sharon City is training their new Class II operator to run tests and then she will no longer be involved in that plant.

EXHIBIT 65

[LOGO]

WELLS ENGINEERS, INC.
11237 Chicago Circle
Omaha, Nebraska 68154
(402) 330-0202

February 23, 1983

Re: Gwaltney of Smithfield, Ltd.
WE # 820602 (Contract)

Mr. Henry L. Morris
Smithfield Packing Company
P.O. Box 447
Smithfield, VA 23430

Dear Mr. Morris:

When we conducted the Study and Report on the waste treatment facilities at your Gwaltney of Smithfield, Ltd. plant, we had established in our proposal letter of June 11, 1982 a "Not to Exceed" figure of $5,000.00, which was over and above the initial $650.00 that you agreed to pay for my trip on June 10, 1982. The Study and Report actually cost $3,371.95, which along with the $650 for the trip made a total of $4,021.95. We billed you for this amount and received payment in full.

Following completion of our Study and Report, we were informed that the personnel at the Gwaltney plant intended to pursue their own course of action on the waste treatment system, and we did not do any further work on the project until we were notified by you that the Virginia Water Pollution Control Board (in their letter of November 12, 1982) declined to accept the alternatives suggested by the Gwaltney personnel.

We were then requested by you to develop a schedule and a Plan of Action for you to submit to the Virginia Water Pollution Control Board in accordance with their letter of November 12, 1982. This schedule and Plan of Action was transmitted to you on November 23, 1982.

On December 1, 1982 we received a call from Sharon City stating that you had contacted the State of Virginia Water Pollution Control Board, who told you that they felt our suggested schedule was a reasonable one, and that official word would be received following the meeting of the Virginia Water Pollution Control Board. At that time we were requested to proceed with the development of final plans and specifications. We then transmitted two preliminary copies of those plans and specifications and requested additional surveying information on December 23, 1982. We subsequently transmitted three sets of plans and specifications to the Virginia State Water Control Board on January 5, 1983 and have now received a reply letter from them dated February 18, 1983. We are currently in the process of responding to their letter. Our Schedule of Compliance anticipated that we would receive approval of the State Water Control Board by January 31, 1983. We were approximately 6 days late in transmitting plans to them, and they are approximately two weeks late in replying to the plans that were submitted. The schedule called for opening bids on February 25, 1983. We will not likely be able to open bids before March 25, 1983, assuming a speedy resolution of the remaining problems.

Enclosed is a billing for the work we have completed on the development of plans and specifications for this project through January 31, 1983.

Very truly yours,

WELLS ENGINEERS, INC.

/s/ W. James Wells, Jr.
W. JAMES WELLS, JR., P.E.
President

WJW:jlk
Encl.

EXHIBIT 77

[LOGO]
SMITHFIELD FOODS, INC.
P.O. Box 447
Smithfield, Virginia 23430

(804) 357-4321

March 15, 1984

Mr. Richard N. Burton
Executive Director
State Water Control Board
P.O. Box 11143
Richmond, Virginia 23230

Dear Mr. Burton:

I received your letter by certified mail expressing your concern over the TKN violations at the Gwaltney of Smithfield, Ltd. facility since September of 1983. In your letter you explained a brief history of the problems at Gwaltney and I would like to make some corrections regarding the comments.

I have attached a Chronology of Events that was furnished to me by Henry L. Morris, Vice President/ Engineering, who is responsible for the wastewater systems at both plants. This chronology of events is backed up by written correspondence from both Henry Morris and the SWCB. I am particularly concerned that while we submitted our plans and specifications on January 5, 1983 to modify the system, it took the SWCB until the end of May to approve our plans. I might also note that Mr. R.V. Davis, the Executive Director of the SWCB, in 1982, was in agreement with Wells Engineers report proposed in August of 1982, and which was the basis for the plans and specifications submitted in January 5, 1983. We were prepared at the time to react very quickly to the TKN problems but it took five months to

go through the approval procedure even though the SWCB was aware of our plans in August 1982.

Because of the length of time to obtain approval, the bids received to modify the system in January 1983 had to be resubmitted and verified prior to the beginning of construction. As you can see by the attachment, the contract was awarded on June 17, 1983 and construction began July 6, 1983. Further, only 2½ weeks were lost during construction due to obstacles that were not detailed on any of the Gwaltney prints. We found ourselves in a difficult situation throughout November 1983 with the Smithfield Packing Company lagoon system and the need to remove the sludge from their anaerobic lagoons. We requested permission from SWCB to pump the sludge to the abandoned lagoon in the Gwaltney system knowing that the overflow would go through the Gwaltney wastewater system. The SWCB concurred with our suggestion and we bagan pumping sludge on November 16. We found we had to control pumping levels so as not to overload the Gwaltney system with runoff from the abandoned Gwaltney lagoon and we metered the pumping rate accordingly. After pumping of the sludge was completed, we found we still had higher than expected levels in our new anaerobic and aeration lagoons and we requested Wells Engineers assist us in determining the reasons. We found that while we were solving one problem we created another. We found several restrictions in some non-essential piping in the effluent piping which created level control problems in our new lagoon. The restrictions in the non-essential piping were removed, and as you can see, from mid-December on we have showed a steady decrease and on February 8 our last TKN violation occurred.

Further, our TKN monthly average was below the allowable average during the month of February and to this date we have experienced no violations of our permit for the month of March.

We feel we have fulfilled our obligations as we first stated in October 28, 1982 to address the problems and expediently correct the problem. The SWCB in examining our proposal delayed the overall construction and completion by approximately five months. We feel the action of the staff in threatening legal action before the Board Members of the SWCB is inappropriate. The facility is in compliance with its NPDES permit, and according to Wells Engineers and our staff people, is functioning as intended and our effluent treatment is improving daily.

Sincerely yours,

/s/ Joseph W. Luter
JOSEPH W. LUTER, III
Chairman of the Board

/eb

cc: Tidewater Regional Office, SWCB
Bureau of Applied Technology, SWCB
Bureau of Enforcement, SWCB
Attorney General, Gerald L. Baliles
Attorney-at-Law, H. Woodrow Crook, Jr.

CHRONOLOGY OF EVENTS CONCERNING WASTE WATER PROBLEMS AT GWALTNEY OF SMITHFIELD, LTD.

October 28, 1982 — I wrote a letter to R. V. Davis stating changes in the management structure at Gwaltney and accepting responsibility for the wastewater system and the corrective actions that would follow based on a report submitted by Wells Engineers in the Spring of 1982.

November 12, 1982 — I received a letter from R. V. Davis asking for a plan of action by November 30th and questions about our approach to resolve the problems.

November 30, 1982 — I responded with a letter to Mr. Davis with compliance schedule as follows:

1. submitting plans and specs to SWCB by 12/30/82
2. expected approval from SWCB by 1/31/83
3. opened bids 2/25/83
4. awarded contract and started construction 3/1/83
5. complete construction and start-up plant 4/15/83
6. achieve compliance 5/27/83
7. evaluate performance of system for the year end 6/22/84.

January 5, 1983 — Plans and specifications submitted to SWCB.

February 18, 1983 — Letter from SWCB requesting answers to four questions concerning the plans submitted.

March 2, 1983	Submitted a detailed answer to each of the four questions requested by the SWCB.
March 10, 1983	We received another letter requesting further information about our plan.
March 31, 1983	We submitted answers to three questions complete with calculations showing the basis of our design.
April 27, 1983	We received a letter from the State indicating forthcoming approval but also requesting comparative data on nitrification from a similar packing plant and a new schedule of compliance by May 31, 1983.
May 13, 1983	We submitted data from (3) comparative packing plants and a new schedule of compliance as follows: 1. Start construction 10 days after approval 2. Complete construction 65 days after starting 3. Achieve compliance 45 days after completion
May 31, 1983	The State wrote a letter approving the modifications to the Gwaltney waste treatment system. This letter was received on June 3, 1983 by Sharon City but due to my absence was not officially received until June 10, 1983.
June 17, 1983	Contract was awarded.
July 6, 1983	Construction began (the reason for the delay was because we had to firm-up prices submitted on the previous quotations due to delays in approval of the system modifications by the SWCB).

October 18, 1983	Construction complete-2½ weeks lost during construction due to obstacles located underground as the piping for the lagoon system was being laid. This was detailed to Anne Field in a letter dated September 19, 1983.
November 16, 1983	Begin pumping sludge from Smithfield Packing lagoon system to abandoned anaerobic lagoons at Gwaltney.
November 18, 1983	We reduced pumping levels due to rising levels in abandoned lagoons forcing additional flow to the modified system.
December 1, 1983	Fabricated and installed slide gate to control flow from the old aeration lagoon.
December 4, 1983	Slide gate working well, levels begin dropping.
December 7, 1983	Experienced extremely heavy rains creating high levels in the lagoon system and upsetting the modified anaerobic and aeration basins.
December 8, 1983	Wells Engineers evaluated the system and found restrictions in non-essential piping in the effluent discharge which were magnifying problems with level control in the new anaerobic and aeration basins.
December 11, 1983	Non-essential piping was removed from the system.
December 15, 1983	Level of new aeration basin steadily dropping, solids building, TKN dropping.
December 31, 1983	System began functioning as intended with the design by Wells Engineers. Solids were building to around 3,000 Mg/*l* in the aeration lagoon and the cover on the anaerobic lagoon was beginning to build.

TKN violations since 12/01/83 (permit limit 219 Kg/d) (109.1 Kg/day average/month) :

12/01/83	385.06
12/06	296.28
12/07	407.78
12/08	380.51
12/13	397.91
12/14	560.18
12/15	441.11
12/19	539.66
12/20	573.03
12/21	580.56
12/27	369.02
12/28	466.75
12/29	469.12
1/04/84	489.97
1/05	461.78
1/06	445.16
1/09	375.36
1/10	310.46
1/11	330.80
1/17	342.38
1/23	248.65
1/24	240.18
2/08	233.7

The last TKN violation was 2/08/84. February monthly average was 103.8 Kg/day, which is below the allowable average of 109 Kg/day. This system's grease bearing anaerobic lagoon is developing a grease cover and the system is beginning to function as intended with satisfactory effluent falling within the limits of our NPDES permit.

EXHIBIT 101

STATE WATER CONTROL BOARD

STAFF REPORT

IN RE:

GWALTNEY OF SMITHFIELD, INC.

March 25-26, 1984

General Assembly Building
Senate Room B
Richmond, Virginia

MR. ARIAIL Next item, Mr. Burton

MR. BURTON The next item Mr. Chairman, is Gwaltney of Smithfield, Inc., a staff report by Larry McBride.

MR. McBRIDE Mr. Chairman, this will be a staff report for the purpose of briefing the Board on certain problems which Gwaltney of Smithfield has had in meeting conditions of their NPDES permit. Mr. Terry Switzer, an Engineer from my staff will be presenting the staff presentation. I believe the Vice-President of Engineering with Gwaltney of Smithfield, Mr. Henry Morris, is also with us today and I think he wishes to address the Board on the subject following Mr. Switzer. Terry.

AFTER BEING DULY SWORN

MR. ARIAIL Why are we swearing in on this one?

MR. McEACHERN On advise from Mr. Butcher.

MR. BUTCHER This is essentially a 15 day appearance, Mr. Chairman.

MR. ARIAIL O.K.

MR. SWITZER Mr. Chairman, Members of the Board, Gwaltney of Smithfield, Ltd. is a swine slaughtering and processing operation located in Smithfield, Virginia. Wastewater is treated on-site and discharged at an average rate of about 1 mgd to the Pagan River under an NPDES permit which was originally issued in October, 1974. The company, previously named ITT Gwaltney, was sold to Smithfield Foods in October, 1982. This viewgraph summarizes the sequence of events which this report will discuss. TKN limitations were included in the company's permit in August of 1980 due to dissolved oxygen concerns in the Pagan River. Violations of the TKN limit occurred yearly during cold weather, and the company was requested to submit plans for upgrading to achieve TKN compliance. In August, 1982, the company's consultant submitted preliminary plans. However, the company modified those plans to reduce the

costs, and the staff felt that the modified plans were not satisfactory. Then in October, 1982 the company was purchased by Smithfield Foods, and the new management approved the consultants original preliminary design. A proposed schedule of compliance was submitted in November of 1982 which included a May 27, 1983 date for permit compliance. Final plans were received in January of 1983. After all questions pertaining to the plans had been satisfactorily addressed, final approval was granted on May 31, with a request for a revised schedule of compliance and monthly progress reports. This revised schedule called for permit compliance by October 8, 1983. By August, the staff had not received any of the requested progress reports, and a letter was sent from the Bureau of Enforcement reminding the company of the request for the reports and of the need to adhere to the schedule of compliance. A progress report was submitted at the end of August, and it was noted that the company was in violation of the construction completion date of August 24th contained in the schedule. The company reported that the delay had been due to problems with awarding a contract and several additional construction related delays. The new completion date was projected to October 5. No further progress reports were submitted, and the modifications were completed on October, 1983. Unfortunately, just as Gwaltney's newly modified treatment system was being brought on line, problems developed in the system as a result of activities in progress at the Smithfield Packing Co., owned by the same company as Gwaltney and located across the street. Smithfield Packing Co. had been experiencing major problems with its treatment system, and was involved in a remedial program to correct the problems. This remedial program involved pumping sludge from the Smithfield's Packing Company's treatment facility to an abandoned anaerobic lagoon at Gwaltney, and for the resulting excess liquid to be bled slowly through the modified treatment system. While this was in progress,

a period of heavy rainfall occurred. No flow control capability had been initially been installed within the Gwaltney system to control flows between the abandoned lagoons and the newly modified system. Gwaltney's effluent pumps could not handle the added flows from both Smithfield Packing Co. and the rainfall. Water levels rose throughout the Gwaltney system, causing hydraulic overloading and continued violations since December, 1983 when the new system was brought on-line. Unfortunately, the sludge pumping operation continued through this period, adding to the hydraulic load. Therefore, despite the company's schedule calling for compliance in October, 1983, the facility continued to be in violations of its permit. This chart shows the TKN levels discharged by Gwaltney since the inclusion of these limitations in their permit. The blue areas represent the average monthly TKN levels, the red areas the maximum daily TKN levels. The upper dashed line in the maximum daily limit included in the permit. The lower dashed line the average monthly limit included in the permit. It should be noted that the TKN violations at Gwaltney have generally occurred during the cold temperature months of November through April, when nitrification is generally reduced. During these months dissolved oxygen levels in the stream are not critical, and the impact on the stream would not be major. This is in contrast to the situation at the Smithfield Packing Co., where TKN violations have continued through the summer months when stream D.O. is critical. A Virginia Institute of Marine Science model was recently run on the Pagan River, and the results substantiated that the winter dissolved oxygen levels should not be adversely affected by the elevated TKN levels. Moreover, the discharge levels are now returning to within compliance levels and the staff feels confident that the new treatment system will be able to maintain permit compliance. As shown in the viewgraph, the average monthly TKN level in February was within the permitted limit and

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the maximum violation resulted from only 1 sample in excess of the permitted maximum daily limit. The NPDES permit for Gwaltney is due for reissuance this October, and the most current information available at that time will be incorporated into the reissued permit. Most recently, the Chesapeake Bay Foundation and the NRDC have notified Gwaltney that they intend to jointly file suit in accordance with Section 505 of the Clean Water Act for violations of their NPDES permit as previously described. Since the staff has been unsuccessful for such a long period of time in our efforts to bring this facility into compliance, and in view of the legal action by the environmental groups, the staff wished to bring this matter to the attention of the Board. That concludes the presentation, if the Board has any questions, I'd be happy to answer those.

MR. ARIAIL Let me make sure, most of the presentation you made didn't, that had to do with different violations, didn't it?

MR. SWITZER No, this was all based on TKN violations only.

MR. ARIAIL Those flows that were coming from the adjoining plant?

MR. SWITZER Those flows resulted from sludge being pumped from Smithfield Packing Co., into an abandoned lagoon at Gwaltney. As the sludge entered the lagoon, the liquid level above it rose and was to be bled slowly through the remaining system.

MR. ARIAIL That's not happening anymore?

MR. SWITZER That was a temporary occurrance. Smithfield Packing Co. needed to eliminate the accumulated sludge in one of their lagoons, and . . .

MR. ARIAIL Aren't we proceeding to get Smithfield, or isn't that . . .

MR. SWITZER Well, right, well that was a different problem.

MR. ARIAIL Are we treating that as being Smithfield's problem?

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MR. SWITZER Well, it's the same company.

MR. ARIAIL I know, but, have we taken any enforcement action for that, or is that part of this?

MR. SWITZER Not for the sludge pumping operation, we haven't.

MR. ABBITT We do have enforcement action against Smithfield though, don't we John?

MR. BUTCHER Mr. Chairman, yes we are in court with Smithfield at the present time.

MR. ARIAIL But, it is not that particular . . .

MR. BUTCHER No, the action against Smithfield is directed toward Smithfield's own discharges from his plant and has not been amended to include this incident.

MR. ARIAIL Well I understand that what we are saying now, is, what I believe you said is that these TKN standards are likely not to be included in the permit when it is reissued?

MR. SWITZER No, when the permit is reissued in October, we intend to use whatever the latest information we have on the various modeling efforts at that time to develop the proper type of permit to be reissued. Whether it includes limits changes or additional monitoring, that has yet to be determined.

MR. STANDING Are you saying, to put things in the proper perspective, that the TKN limitations in their permit are not necessary to protect the water quality and because if it is a violation shown to those TKN's in the permit, it's triggered bells with other organizations, saying they are in violation of their permit so we are going to sue Smithfield, when in fact there is no water quality damage?

MR. SWITZER No, what we are saying is that during the winter months, we don't believe that the violations that Gwaltney has been experiencing have adversely effected the water quality because during the winter dissolved oxygen in the river isn't critical, and the dissolved oxygen concerns are the reason the TKN limits were put into the permit. Now, had the violations

occurred during the summer, that would be a critical D.O. period and would probably have adversely effected the water quality.

MR. STANDING So, the plan is to revise those TKN limits in the new permit that will be issued in October?

MR. SWITZER Those limits will be looked at closely, and some type of revision will probably be necessary.

MR. ARIAIL O.K., anymore questions of Mr. Switzer? We want to hear from, is there a representative of the Company here?

MR. SWITZER Yes sir.

MR. MORRIS Mr. Chairman, Members of the Board, by name is Henry Morris, I am Vice-President of Engineering for Smithfield Foods. Smithfield Foods is the parent company for Smithfield Packing Company, the packing company located on the left side of the screen and Gwaltney of Smithfield, the packing company located on the right side of the stream. Both of these plants are located in Smithfield, Virginia. I would like to clarify some of the things that Mr. Terry Switzer said, because I think that there are some errors in his presentation. 1) We acquired Gwaltney from the ITT organization in October of 1981. We elected to maintain the ITT management staff for approximately a year, and there were many changes that we made at that, in the management staff during the first year. At the time that we acquired Gwaltney we found that we were in violation of the TKN limits with the Gwaltney wastewater system. In the spring we acquired Wells Engineering out of Omaha, Nebraska to study the Gwaltney system and make a presentation, which they did, in fact as Terry Switzer said, in August of 1982. I assumed responsibility for the engineering aspects of the Gwaltney operation in October of 1982 and found that prior management had elected to present a plan different from Wells Engineering to the State Water Control Board. As you can see on the chronology of events that occurred from that point on. I contacted Mr. Davis, who was then

the Executive Director of the State Water Control Board, assured him that the management structure at the Gwaltney organization would respond promptly to the problem of TKN, which in fact we did. We submitted a schedule per his request by the first of the year, which was almost verbatim the plan that Wells' Engineering staff had proposed. We proceeded at the time to obtain bids and begin our plans for construction. By looking at the chronology of events, you can see that from January the 5th, over on the second page, until May the 31st we received numerous questions from the State Water Control Board concerning the, our plan for implementing a modification to the Gwaltney system and also some of the calculations that were behind the proposal prior to the time the award, the approval was given. We in fact received the approval on May 31st. I was out of the country at the time we received the approval and I reacted when I returned, on June 10th. This is a picture of the Gwaltney wastewater system as construction was beginning. The Gwaltney system consisted of an anaerobic lagoon in the center of the picture, the lagoon with the cover. A large aeriation basin, the basin directly behind the white warehouse building with the division in the middle of the lagoon was a stabilization pond within the system, and then in the very bottom right hand corner you can see one of the two twin clarifiers. The Wells Engineering report in essence called for a re-structuring of this lagoon system, that we would totally eliminate the large aeriation basin that is directly in the center of the picture where you can see the aeriation activity. Modify the stabilization pond on the right hand side of the picture, so that we had increased anaerobic capacity and a very small aeriation basin. We in essence installed an activated sludge system very similar to the one we have next door in Smithfield Packing Co. This picture is, was taken sometime in the summer and construction had begun. One of the problems we had early on was all of the bids that we received back in

January and February months had to be updated because of the length of time it took for the State Water Control Board to approve the plan. Once the bids were received and renewed, the contract was awarded and we actually began construction on July 6, 1983. During the construction period we lost approximately 2½ weeks, which I thought was remarkable for a project of this size. Most of the lost time was due to pipelines that we were running to and from the plant and obstacles that we hit underground that weren't marked on any print. This is a facility that has been added onto, I guess many times, in the last several years and most of the drawings of the internal part of the plant and the plumbing are not on paper. We hit obstacle one after the other and it did create some delays for us, but we moved right along and completed the construction of the lagoon system and actually effective startup on October 18, 1983. Mr. Switzer has said that we had a problem with Smithfield Packing anaerobic lagoons and pumped our sludge from those lagoons to this system. As the system, I'm going to move over to the slide to show you a couple of things. We had an abandoned anaerobic lagoon on the back side of the aeriation basin that would overflow to another abandoned lagoon which would ultimately overflow to this aeriation basin. We took the piping from across the road, across this roadway, down to this anaerobic lagoon to pump the sludge out of the two anaerobics at Smithfield Packing that were virtually of a dialated sludge. We began pumping the sludge on November 16, we reduced the flows from the Smithfield Packing Co. on November 18, when we found that the water level in the old aeriation basin was rising rapidly and we were completed with the pumping of the sludge from the 2 anaerobic lagoons by November 24, 1983. The short period of time that we were pumping really didn't impact the system that much. What we had really done was that we had solved one problem and created another. We found many, in the piping arrangement

from the pumping station in the new aeriation basin to the chlorine contact tank and ultimately to the Pagan River, we found an awful lot of restrictions in that piping and a lot of the piping was non essential. You couple that with the flow from the plant, some very heavy rainfall in the period, the latter part of November and the first part of December and we were hydraulically overloaded. We modified the piping on the discharge side of the lagoon system to the river. We were immediately successful, as far as our pumping and our levels in our lagoons reduced, and as you can see on the last page of this chronology of events, I've listed our TKN violations from December 1—present. If you will look down about December 19th, you will see that we had a 539 kg/d violation, but if you will look at the pattern following that 19th of December you will see a drastic drop through the winter months, when our violations have occurred in the past years, of the TKN violations down to a point of February 8th, which was 233 kg/d, our permit limit being 219. Since that time, we have had no violations of TKN and the system is developing a grease cover over the anaerobic lagoon. The aeriation system is working as it was designed. I believe we have eliminated the TKN as a problem with the Gwaltney system. I don't think any of these other slides are really particularly pertinent to the issue. I included one slide that would show you the proximity of the Pagan River from the lagoon system. As Terry Switzer indicated, the mathematical model that was performed on the Pagan River in the mid-seventies has been restudied. We had a meeting this past Thursday with the State Water Control Board. We are in hopes that some relaxing of the TKN standards through the winter months would be possible, since the state has indicated that the impact to the Pagan River is virtually non-existant during the winter months. I'll be happy to answer any questions, if the Board has any.

MR. ARIAIL Are you saying that you think when it starts running though you would be able to meet the TKN standards that we've got now?

MR. MORRIS The design by Wells Engineering was to meet a TKN limit, maximum of 219 kg/d, 109 kg/d monthly average.

MR. ARIAIL What would the, if the permit ended up being modified to give you higher limits during the winter months, would that just give you extra capacity or would it reduce what your treatment had to be at some point?

MR. MORRIS Let me try to answer that question in a little different fashion. The hardest time for a treatment system of this type to control TKN is through the winter months of the cold temperature. As the water temperature reduces down to a point of about 50°F, the TKN limit can jump immediately as the water may fluctuate in 2-3°. With the large surface areas we had on the aeriation basin before, it was very easy for that aeriation basin to drop in temperature as the outside temperature did. With the new smaller aeriation basin, we hope that we can maintain the temperature in that the average water temperature of a meat packing plant, the effluent is rather high because of, just because of the nature of the operation. We don't have much control over the weather, we don't have any control over a duration of a real hard cold spell and I can see, there could be some violations if we got into some very severe temperature problems. It's our hope and certainly the best expertise we have says that we should be within limits, that we should meet the limitations. I just project our concerns as far as our inability to control the weather with this particular type of system.

MR. ARIAIL Any other, any questions?

MR. MILLER Just one question Mr. Chairman. Have you completed all the transfer of the sludge from the other plant?

MR. MORRIS Oh yes sir. We completed the pumping of the sludge from the two anaerobic lagoons on November 24th, Thanksgiving Day, this past year. We then moved over and pumped the sludge out of an old sludge holding pond that had been eliminated from the system. Our new plan at Smithfield Packing, calls for us to utilize that small holding pond as an aeriation basin and we had to eliminate all of the sludge from the pond before we began work on the system. But, we completed the pumping of that sludge, and we pumped it at a very slow rate and we were able to hold the water levels down, primarily because of the modifications we made to the piping between the pumps and the Pagan River. We were able to hold that pumping down and get it pumped sometime I think around the 1st of January.

MR. ARIAIL Any other questions, comments? Thank you very much.

MR. MORRIS Yes sir.

MR. McBRIDE Mr. Chairman, the staff would simply recommend in this case that you accept this status report and direct the staff to consider the updated results of the mathematical modeling in the reissuance of the NPDES Permit for this facility.

MR. ARIAIL I see Mr. Watson's here from the Chesapeake Bay Foundation, I don't want to put you on the spot, I'd be interested in knowing why ya'll are thinking about suing when it seems to me, we may incline toward not taking any action for past violations, from what I've heard. Let's see if I'm missing something.

MR. WATSON I didn't come prepared to make a statement, but I'll be glad to answer your question.

MR. ARIAIL I understand, was this just a routine filing, are ya'll going through routinely filing these notices, or was there some particular reason that ya'll filed a notice in this particular situation?

MR. WATSON No, we routinely follow the enforcement of NPDES permits, but this is by no means a routine action on our part. In examination of the industrial

major dischargers in the State of Virginia for the past 5 years or so, this is one of the worse enforcement records we have seen. Smithfield Packing, the other company, also has a very bad record and I think that possibly at looking at the two in comparison you are not giving quite as much consideration to this case as would be warranted under the circumstances. As you know, enforcement of NPDES permits is a problem nationwide and I think it's a problem in Virginia too, if this type of record goes by with no more enforcement than has occurred on it to this date.

MR. ARIAIL Ordinarily I'm inclined to agree that there is a problem, but it seems to me we've got action against Smithfield, I'm not trying to argue, I just really trying to understand because I'm inclined personally not to take any action in this case, and before we do things like that I like to hear the other side a little bit. Whatever we do, obviously ya'll can go ahead with your law suit, but that's a much more cumbersome way of dealing with the problem. We're going ahead with Smithfield, we have some violations with Smithfield, but they were in court, is that correct?

MR. BUTCHER We're in court with Smithfield, Mr. Chairman, they're under a temporary injunction and the penalty case is going forward into discovery right now.

MR. ARIAIL So, we really are just dealing with this issue alone, we've got separate action against Smithfield, so we recognize that they may have had other corporate problems. O.K., any other, I don't really mean to, I'm not trying to argue with you, I just wanted to hear from ya'll. Anybody have any questions from Mr. Watson? Thank you. Do we need to go into Executive Session on this or do I hear a motion for the staff recommendation.

MR. STANDING I move we adopt the staff recommendations.

MR. CRAGWALL Second.

MR. MILLER Will the staff come back in June with the response . . .

MR. ARIAIL What does that mean if we adopt the staff recommendations?

MR. McBRIDE Mr. Chairman, the reissuance of the company's NPDES permit is scheduled for October, so we could give you a status report in June, possibly by then we will have resolved the question of the application of the TKN limits during winter vs. summer months. But, it would not be until October that we reissue that permit.

MR. ARIAIL But, the violations at the moment, as I see the evidence, it seems to me that they are under control.

MR. McBRIDE I believe that's true, and another thing that you should recognize. A major difference between the way we are handling this action vs. the Smithfield Packing Co., although the Smithfield Packing Co. violated TKN and Gwaltney is also violating TKN. The big difference is when. Smithfield Packing's violations occurred during the summer and we had evidence that there were dissolved oxygen problems in the river, which we felt were related to those. In this case the violations have largely been during the winter months and we have no evidence of water quality problems. You are right, they are now under control.

MR. ARIAIL It just doesn't seem to me that it accomplishes anything from my point of view to take enforcement action for violations of standards that seem to have been not necessary at the outset. Now, that may be hindsight, but that's . . . anybody else have any comments, any further discussion on the motion? All those in favor of the motion, signify by saying "Aye", opposed.

UNANIMOUS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC., and
NATURAL RESOURCES DEFENSE,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS STATED FROM THE BENCH

BEFORE: Honorable Robert R. Merhige, Jr.
United States District Judge

Richmond, Virginia
August 28, 1984

THE COURT: This is a motion by plaintiffs for partial summary judgment, on the issue of liability, in a "citizens' suit" to enforce certain requirements of the Clean Water Act, 33 U.S.C. §§ 1311 *et seq.* (the Act), against a food-processing facility. No effort was made to set up a factual issue that was not present; there are no factual issues here. The matter is ripe for summary judgment.

The first of two plaintiffs here, Chesapeake Bay Foundation, is a non-profit organization organized under the laws of Maryland. Its principal place of business is in

Annapolis, and it has an office in Richmond. It is a regional conservation organization with thousands of members in the Chesapeake Bay area. Some of its members reside in Virginia in the vicinity of the Pagan River, and they use and enjoy the river and the water system. (All this is set forth in plaintiffs' uncontested affidavits.)

The Court finds that the quality of the nation's waters and waters of the Commonwealth directly affects the health, recreation and esthetic environmental interests of that organization and its members.

The Court finds that the interests of that organization and its members have been, are being, and will be adversely affected by the failure of defendant, Gwaltney of Smithfield Limited (Gwaltney), to comply with its National Pollution Discharge Elimination System (NPDES) permit.

The second plaintiff, Natural Resources Defense Council, is a non-profit membership organization organized under the laws of the State of New York with offices in New York, Washington and San Francisco. It has over seven hundred individual members within the Commonwealth of Virginia. They, like the members of the Chesapeake Bay Foundation, utilize the river and are affected by Gwaltney's failure to comply with its NPDES permit. (This too is by uncontested affidavit).

Jurisdiction in the case is pursuant to 33 U.S.C. § 1365(a)(1); the Court finds from the uncontradicted evidence that on October 23, 1974 the Virginia State Water Control Board issued, to the defendant, NPDES Permit Number VA 0002844, pursuant to VA. Code Section 62.1-44.15, Section 402 B. of the ACT, and an approval of Virginia's program by the Administrator of the United States Environmental Protection Agency under Section 402 of the Act, 33 U.S.C. § 1343, dated March 31, 1975.

The permit was reissued on October 23, 1979, modified by the addition of a TKN limitation on August 1, 1980, and it has remained in effect to this date.

The defendant's monthly reports under its permit, which are required to be filed, reflect that between January 1979 and June 15, 1984 it has on at least 237 occasions discharged substances into the Pagan River, which is a tributary of the James River and Chesapeake Bay, in excess of the amounts allowed by its permits. Defendants' monthly reports may be used to establish civil liability under the Act. *See, e.g., United States v. Ward*, 448 U.S. 242 (1980).

Under 33 U.S.C. 1311(a), any discharge is unlawful unless it is authorized by one of several specified sections of the Act, including Section 402(b) of the Act, 33 U.S.C. 1342(b). Section 402(b) provides that compliance with the permit issued pursuant to this section shall be deemed compliance with Section 301 of the Act, 33 U.S.C. § 1311, for purposes of enforcement under Section 309 of the Act. 33 U.S.C. § 1319, or under Section 505 of the Act, 33 U.S.C. § 1365.

Without more, then, to violate an NPDES permit condition is to violate the Act. *E.P.A. v. State Water Resource Control Board*, 426 U.S. 200, 205 (1976), *Natural Resources Defense Council v. Costle*, 568 F.2d, 1369, 1374-77 (D.C. Circuit 1977).

There being no genuine issue as to any material facts, the plaintiffs are entitled to summary judgment in the form of a declaration that the defendant has violated the Act, for which it must be held liable. It is so ORDERED.

Gentlemen, we might just as well set it down for whatever else you want to do with it. I will see you in chambers. Thank you for your help.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed Aug. 30, 1984]

ORDER

For the reasons stated from the bench and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

Defendant's motion to dismiss be and the same is hereby DENIED.

Defendant's motion to abstain be and the same is hereby DENIED.

Plaintiffs' motion for partial summary judgment be and the same is hereby GRANTED, and the Court declares defendant Gwaltney of Smithfield, Ltd. to have violated and to be in violation of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311 and 1342.

The matter of appropriate remedy and injunctive relief is, upon motion of parties, continued until further order of the Court.

Let the Clerk send a copy of this order to all counsel of record.

/s/ [Illegible]
United States District Judge

Date Aug. 30, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC., *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed Nov. 16, 1984]

ORDER

After hearing counsel for the parties at a status conference held on the 7th day of November, 1984, it is hereby ADJUDGED and ORDERED as follows:

1. Defendant's Motion for Rehearing is GRANTED, and this Court's Order of August 30, 1984, is AMENDED to provide that the Court declares defendant Gwaltney of Smithfield, Ltd. to have violated the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311 and 1342, on those occasions subsequent to October 27, 1981, that are documented by Discharge Monitoring Reports that it has submitted to the Virginia State Water Control Board.

2. Counsel for the plaintiffs shall serve proposed findings of fact and conclusions of law on counsel for the defendants no later than November 27, 1984, and counsel for the defendant shall serve proposed findings of fact and conclusions of law on counsel for the plaintiffs

no later than December 4, 1984. Counsel for the parties shall thereafter meet and confer in an effort to enter into a comprehensive written stipulation of the facts and the law relevant to the imposition and amount of a civil penalty for the defendant's violations of the Federal Water Pollution Control Act. All stipulations shall be filed with this Court no later than 12:00 noon on December 14, 1984, together with the parties' proposed findings of fact and conclusions of law regarding those issues that cannot be resolved by stipulation.

/s/ [Illegible]
United States District Judge

Date Nov. 16, 1984

Seen and Agreed to:

/s/ Jeter M. Watson
JETER M. WATSON
Chesapeake Bay Foundation, Inc.
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Richmond, Virginia 23219
Counsel for Plaintiffs

/s/ Anthony F. Troy
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Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CA-84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.,
Plaintiff,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[TRANSCRIPT OF PROCEEDINGS]

Richmond, Virginia

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge

Appearances:

JETER W. WATSON, ESQ.
JAMES THORNTON, ESQ.
ANN P. GAILIS, ESQ.
SCOTT BURNS, ESQ.
For the plaintiff

ANTHONY F. TROY, ESQ.
JAMES E. RYAN, JR., ESQ.
H. WOODROW CROOK, JR., ESQ.
For the defendant

GILBERT FRANK HALASZ, RPR
Official Court Reporter

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[87] Q. Mr. Sneed, would the proposed interim solution and the permanent solution, so called, did you tell the company that both would meet permit compliance?

A. We felt they were both acceptable alternatives that stood a good chance of meeting the limitations, otherwise we would not have proposed them.

Q. Would you describe very quickly for the court the change in the aerators design which has been introduced and how that would improve waste water treatment at the plant?

A. Yes. The original aerators which were in the aerated lagoon originally from I. T. T. Gwaltney which were then moved to the new aerated lagoon do result in fairly large amount of temperature loss, particularly during the winter [88] time. So as those have needed repair or needed replacement they have been replaced with a submerged type of aerator.

Q. Does that minimize heat loss, and does it make it more likely that the plant would comply with its T. K. N. limitations?

A. That is correct.

Q. You have reviewed the waste water characteristic, I take it, that come out of the packing plant. Are you aware—just characterize the waste water for me, if you would, please. Tell me what it is like.

A. Yes, sir, it is a highly biodegradable waste as you would expect from food, that is, coming from pork. It is very readily treatable by the bacteria in the treatment plant by virtue of being a food waste. It is not a toxic type of waste. In fact, we had a number of toxics analyzed and none of them showed any concentrations that would be of concern.

Q. So to your knowledge there is nothing in the waste water that would be toxic, that is of any concern?

A. No, sir.

Other than chlorine, which is required by the State Water Control Board to meet the fecal limitations.

Q. All right. I don't believe I have further questions.

THE COURT: All right.

MR. BURNS: I will try to make it brief. I only have a few questions, a couple areas I want to touch on.

[89] CROSS-EXAMINATION

BY MR. BURNS:

Q. Isn't it in fact, through, that your company advised defendant, I believe you have testified, prior to the purchase of the Gwaitney facility that there were inadequate technology there with regard to meeting T. K. N. limits?

A. Sharron City called our firm when Smithfield Foods was considering buying the plant and briefly described the facility that was there briefly and asked our opinion of it. We did indicate that we felt the lack of sludge return was of concern and noted potentially about our other problems that perhaps should be addressed.

Q. Mr. Sneed, when was the Concept Engineering report designed to address these problems prepared?

A. In June and I believe in July of 1982.

Q. That is some eight or nine months after defendant acquired the Gwaltney plant?

A. I believe that is correct.

Q. With regard to the interim solution prepared in the Concept Engineering report, were there not some reservation with regards to its ability to meet T. K. N. limits in the winter?

A. Yes, sir. We did have some reservations, particularly in light of the surface aerators and temperature loss. However, we had designed a very similar type system, a lagoon [90] system with sheet pile baffle walls at Smithfield Packing Company, and that did give us comfort in that regard.

I might also note, of course, that subsequent use of the submerged aerators to replace the surface aeraters.

Q. You referred a number of times in your testimony to Smithfield plant. You designed that plant?

A. Yes, sir.

Q. Have there been compliance problems there?

A. In the past year or so, yes, there have been.

Q. Wasn't that facility in closed by the State Water Control Board as a result of that non compliance?

A. Yes, sir.

Q. Do you think that given that it was unreasonable for the State to request more information from Gwaltney than was provided by Smithfield?

A. Yes, I do. That system performed very adequately for a number of years after it was designed. Only after the design loads were significantly increased did it go out of compliance.

Q. Mr. Sneed, is adequate grease cover important to proper winter T. K. N. treatment of the plant?

A. On the anaerobic lagoon, yes.

Q. You were with us last week when we toured the facility, were you not?

A. Yes.

[91] Q. Isn't it in fact true at that point in time, in December, the lower anaerobic lagoon did not have adequate grease cover?

A. Yes. Earlier in the summer time that lagoon was covered with grease. And that was what we expected would happen.

Quite frankly we were very surprised that that grease cover has deteriorated to this point, and we have since taken steps to accelerate the formation of that grease cover.

Q. Given the importance, as you mentioned before, of maintaining adequate grease cover, isn't there some doubt in your mind as to whether the Gwaltney facility would be in compliance with T. K. N. limits this winter?

A. Yes, we have.

Q. Isn't there some doubt? That is all I am asking.

A. Yes, sir.

I think there is some doubt every year that you would expect the plant to go out of compliance at some time.

Q. I believe you mentioned earlier that the B.O.D. data biochemical oxygen demand data upon which you relied in developing the Concept Engineering report were within expected limits?

A. Yes, sir.

Q. Isn't that because you chose to disregard the higher B.O.D. numbers reported on two to three days tested?

[92] A. We did disregard the higher B.O.D. and suspended solids numbers on those days because the comparison of those parameters with the T. K. N. and the grease indicated there was probably a grease spill which skewed those numbers. The one remaining sample which we did choose to believe is within norm of what we would expect from this type of plant.

Q. You stated earlier, did you not, there were at least some reservation in your mind with regard to the inability of the interim solution to meet T. K. N. limits in the winter.

A. Yes, sir.

Q. Defendant didn't at first even chose to implement the interim solution, did they?

A. There was another proposal which was submitted by the personnel of I. T. T. Gwaltney after our Concept Engineering report was prepared.

Q. That report or proposal was submitted in the late summer of 1982, was it not?

A. I believe that is correct.

Q. Did your company express an opinion with regard to the proposed modifications of your interim solution?

A. Regarding our proposed modification?

Q. No. Did your company express an opinion with regard to the modification proposed by Gwaltney when they decided not to follow your interim solution?

A. Yes, sir, I believe we expressed doubt that the [93] proposed—the I. T. T. Gwaltney proposal would meet the limitations.

Q. Do you have an exhibit book?

A. I don't have one in front of me.

Q. Exhibit 60, please.

Can you identify that document for the record, please?

A. This is a memo which was written by Jim Wells, president of our company, to Paula Wells and myself regarding the Gwaltney packing plant.

Q. Could you please read the last paragraph of that memo to the court?

A. "In the meantime, Sharron City is training a new class of operators to run tests."

Q. Next to the last paragraph, pardon me a minute.

A. "Ultimately Mr. Luter will have to decide what to do with waste treatment at Gwaltney Smithfield based upon the reaction of the State of Virginia concerning our report and concerning fines if there are T. K. N. violations, which there most assuredly will be in the winter."

Q. That was with regard to the proposed modifications of Gwaltney to interim solution, was it not?

A. Yes, sir.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed May 16, 1985]

MOTION TO DISMISS
FOR LACK OF JURISDICTION

Defendant Gwaltney of Smithfield, Ltd. respectfully moves the Court to dismiss this action for lack of jurisdiction over the subject matter, for the reasons stated in the accompanying Memorandum.

GWALTNEY OF SMITHFIELD, LTD.

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[Certificate of Service Omitted in Printing]

[*Corrected Copy*]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed June 26, 1985]

MEMORANDUM

Before the Court is the question of the amount that ought to be assessed, in civil penalties, against defendant for polluting Virginia's water in violation of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (the "Act"). The Court has already determined, in granting plaintiffs' motion for partial summary judgment on the issue of liability, that defendant has violated the Act; the parties do not now contest liability. They do, however, differ over (i) defendant's maximum liability for its violations; and (ii) the appropriate penalty for those violations. Plaintiffs contend that defendant is subject to a maximum of $8,300,000 in civil penalties, and that the full measure of liability should be imposed. Defendant, on the other hand, contends that it is subject to a maximum of about $980,000 in civil penalties, and that the Court should assess somewhere between $12,000 and $20,000.

Defendant also vigorously contests the Court's subject-matter jurisdiction over this lawsuit. First, it argues that plaintiffs do not have standing to prosecute this action. Second, it argues that the statute does not authorize citizen suits against defendants who are not discharging unlawfully when the suit is filed.

Following trial, defendant sought and received the Court's leave to file a post-trial memorandum; about a month thereafter, defendant filed that memorandum. Plaintiffs filed a short response, and also had filed a trial memorandum on the day prior to trial. Several months later, defendant filed a motion to dismiss based on its argument that a continuing violation is required, which has been fully briefed. All the foregoing matters are now ripe for disposition.

BACKGROUND

This suit is a citizen enforcement action—a "citizen suit"—authorized by Section 505 of the Clean Water Act, 33 U.S.C. § 1365. Plaintiffs are two non-profit corporations dedicated to protecting natural resources: the Chesapeake Bay Foundation (CBF), a regional environmental group with over 19,000 members residing in the Chesapeake Bay area, including Virginia; and the Natural Resources Defense Council (NRDC), an environmental group with members throughout the nation, including over 800 members in Virginia. Defendant, Gwaltney of Smithfield, Ltd. (Gwaltney), is in the business of processing and packing pork products. It is a subsidiary of Smithfield Foods, Inc. (Smithfield Foods). Gwaltney's plant, the operation of which is the subject of this lawsuit, is situated on the Pagan River near Smithfield, Virginia. In the course of its production, the plant discharges wastewater into that river.

At all times material hereto, Gwaltney was allowed to discharge various pollutants from that plant into the river—within certain limits, as set out in a "National

Pollution Discharge Elimination System" (NPDES) permit.[1] Such permits are issued pursuant to procedures and regulations under the Clean Water Act. *See* 33 U.S.C. § 1342.

From October 27, 1981 until May 15, 1984, Gwaltney's plant exceeded its discharge limitation for a variety of pollutants[2] on a number of occasions. Gwaltney itself reported these violations in its discharge monitoring reports (DMRs), as required by law.[3] Prior to October 27, 1981, Gwaltney was not responsible for the pollution discharges from the plant at issue here. Instead, ITT-Gwaltney, Inc. (ITT-Gwaltney) owned the plant and was responsible. Under ITT-Gwaltney as well as under Gwaltney, the plant repeatedly exceeded a number of its NPDES discharge limitations. Gwaltney acknowledges that it was aware of ITT-Gwaltney's record of noncompliance. Only the violations subsequent to Gwaltney's assumption of responsibility on October 27, 1981, are at issue here, however.

The violations reported in Gwaltney's DMRs form the basis of this action. Where a permittee is in violation of an NPDES discharge limitation, it is also "in violation of . . . an effluent standard or limitation under [the Act]," 33 U.S.C. § 1365(a)(1), which makes the permittee subject to citizen suits. *Id.* For citizen suits under

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[1] NPDES Permit No. VA 0002844.

[2] Those pollutants are: (i) fecal coliform; (ii) chlorine (Cl_2); (iii) total suspended solids (TSS); (iv) total Kjeldahl nitrogen (TKN); and (v) oil and grease.

[3] Section 1318(a)(3)(A) of Title 33 mandates, among other things, that the Administrator of the Environmental Protection Agency "require the owner or operator of any point source" to establish and maintain such records of effluent discharges and to make such reports as the Administrator may "reasonably require." Currently, permittees under the Clean Water Act must submit DMRs. *See* 40 C.F.R. § 122.41(l)(4) (1984). Such reports are public information, by statute. *See* 33 U.S.C. § 1318(b)(2).

the Clean Water Act, Congress has authorized the district courts to assess appropriate civil penalties. 33 U.S.C. § 1365(a). Such penalties may be as high as "$10,000 per day of such violation." 33 U.S.C. § 1319(d).

DISCUSSION

I. Standing.

At the outset, the Court must dispose of defendant's contention that plaintiffs have no standing under either the Act or Article III of the Constitution. Standing is an element of jurisdiction over the subject matter. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 494-95 (1975). Thus, if plaintiffs have no standing, then the Court may not proceed further. *See id.*

Gwaltney contends that plaintiffs' allegations are insufficient to establish standing for CBF and NRDC to sue in their own right. It then acknowledges that the allegations of standing in the complaint, taken alone, might be sufficient for CBF and NRDC to sue on behalf of some of their members. But Gwaltney argues that no such standing has been established because plaintiffs did not present evidence of standing at trial, even though Gwaltney denied plaintiffs' standing allegations in its answer and Gwaltney's counsel demanded prior to trial that plaintiff's counsel establish at trial that plaintiffs meet the Clean Water Act's standing requirements as articulated in *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984). Plaintiffs, on the other hand, argue that they have established standing to sue both in their own right and on behalf of their members. As for standing to sue for their members, they refer to the Court's findings in granting them summary judgment on the issue of liability, as well as to a number of affidavits they have filed at different stages of the litigation.

It is clear that, at least under the Clean Water Act,[4] a citizen enforcer can only establish standing if it meets the requirements of "injury in fact" set forth in *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). *See, e.g., Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984). An organizational plaintiff, such as CBF or NRDC, can establish "injury in fact" through injury to their members as well as through injury to the organization itself. *See, e.g., Sierra Club v. Morton*, 405 U.S. at 739. The parties do not dispute these basic principles of standing.

The Court need not consider the dispute over whether plaintiffs have established standing to sue in their own right, because it concludes that they have established standing to sue on behalf of their members. They established such standing when the Court granted their motion for summary judgment on the issue of liability. In support of that motion, plaintiffs included an affidavit of one of their counsel stating:

> Members of CBF reside in Virginia, in the vicinity of the Pagan River, and recreate in, on, or near, and otherwise use or enjoy the Pagan River and the water system of which it is a part. . . . The interests of CBF and of CBF's members have been, are being, and will be adversely affected by [Gwaltney's] failure to comply with its NPDES permit requirements.

The affidavit included an identical paragraph about members of NRDC. Defendant failed to dispute this in any

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[4] Standing requirements may be more lenient for citizen enforcers suing under the citizen suit provisions of other environmental statutes, where—unlike the Clean Water Act § 505(g), 33 U.S.C. § 1365(g)—there is no limitation of "citizen" to a person "having an interest which is or may be adversely affected." *See, e.g.*, Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (1982) ("any person" can sue); *Metropolitan Washington Coalition for Clean Air v. Washington, D.C.*, 511 F.2d 809, 814 (D.C. Cir. 1975) (discussing standing requirements under the Clean Air Act).

way at the summary judgment hearing, although it had raised the standing issue at the pleading stage.[5] Indeed, Gwaltney failed to file any response whatsoever to plaintiffs' motion for summary judgment, despite the fact that two months had elapsed between the filing of plaintiffs' motion and the hearing on it. In granting plaintiffs' motion the Court specifically stated, in its findings of fact from the bench, that plaintiffs have standing to prosecute this action.

Apparently, Gwaltney believes that any showing of standing that plaintiffs may have made previously is insufficient in light of a recent decision by the Court of Appeals for the Second Circuit, *Sierra Club v. SCM*, *supra*, 747 F.2d 99, construing standing requirements under the Clean Water Act. Gwaltney suggests that the case establishes a requirement that plaintiffs identify affected members in order to establish standing under the Act. The Court does not agree, however.

In *Sierra Club v. SCM*, the issue pertaining to standing before the Court of Appeals was whether the Sierra Club, solely on the basis of its "institutional interest in the preservation of the enviromnent," could sustain "injury in fact" for standing purposes in a citizen suit under the Clean Water Act. *See Sierra Club v. SCM*, *supra*, 747 F.2d at 103. Writing for a unanimous panel, Judge Kearse rejected Sierra Club's contention. After carefully reviewing the legislative history of the Act, she concluded that the Sierra Club could only establish standing by showing actual injury within the meaning of *Sierra Club v. Morton*, 405 U.S. 727 (1972), and that the Sierra Club's "institutional interest" was insufficient in that regard. *Id.* at 107. She furthe held that an

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[5] Gwaltney filed a document titled "Answer and Motion to Dismiss," in which it denied plaintiffs' standing allegations in its "Third Defense." The answer and motion were unaccompanied by any documents that might create a genuine issue of material fact as to plaintiffs' standing, however.

organizational plaintiff can satisfy the actual injury requirement by "providing a concrete indication" that the organization or "one or more of its members" use the waterway into which the defendant discharges its wastes or would be adversely affected by the pollution of that waterway. *Id.*

Despite defendant's suggestion to the contrary, Judge Kearse did not hold that a plaintiff organization must identify its injured members in order to provide the requisite "concrete indication." It is true, of course, that the district judge had dismissed the complaint—at least in part—because the Sierra Club refused to identify any injured member. *See Sierra Club v. SCM Corp.*, 580 F. Supp. 862, 865 (W.D.N.Y. 1981). Despite the controversy in the district court over Sierra Club's refusal to identify members, though—of which the Court of Appeals was well aware, *see Sierra Club v. SCM*, *supra*, 747 F.2d at 102—the Court of Appeals carefully avoided holding that an organization suing under the Clean Water Act must identify injured members in order to establish standing through them. Instead, Judge Kearse —noting that the Sierra Club had submitted an affidavit indicating merely that some of its members lived within a seventy-mile radius of the polluting plant—chose more general language to describe the requisite showing for standing: a "concrete indication" that one or more members "used the [waterway involved] or would be affected by its pollution." Plaintiffs here have satisfied this standard. The unopposed affidavit of plaintiffs' counsel quoted *supra*, which indicates that members of plaintiffs' organization use the river into which defendant discharges its wastes, is sufficient to establish plaintiffs' standing under the Clean Water Act.[6]

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[6] In any event, plaintiffs did ultimately name members. In their response to defendant's post-trial memorandum, plaintiffs attached the affidavits of three affected members who indicated specifically how they used the Pagan River (or the Chesapeake Bay into which it flows), and how they are adversely affected by the pollution of the Pagan River.

II. Continuing Violation.

Gwaltney also argues that the Court has no jurisdiction over this suit because Gwaltney was not in violation of its NPDES permit when the complaint was filed, or subsequently. Gwaltney contends that the Clean Water Act's citizen suit provision only confers jurisdiction where the polluter is engaged in an ongoing violation; where the violation occurred entirely in the past, Gwaltney urges that there is no jurisdiction. Plaintiffs contend, on the contrary, that citizens can sue regardless of whether the polluter's unlawful conduct was continuing at the time the suit was filed.

The dispute is one of statutory construction. Gwaltney's argument centers around the portion of the Clean Water Act's citizen suit provision that reads, in pertinent part:

> . . . any citizen may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged *to be in violation* of (A) an effluent standard or limitation under this chapter . . . .

33 U.S.C. § 1365(a)(1) (emphasis added). Gwaltney points out that the statute does not include the words "to have violated," and argues that the statute therefore only authorizes citizen suits against polluters whose unlawful conduct is occurring at the time the suit is filed.

In analyzing whether Gwaltney's position is correct, the Court begins with the familiar principal that it need not consider a statute's legislative history where the statutory language itself is clear. *See, e.g., Ex Parte Collett*, 337 U.S. 55, 61 (1949). Despite Gwaltney's protestations to the contrary, the Court does not believe that the statutory language on which Gwaltney rests its argument clearly supports Gwaltney's position. Other courts besides this one have perceived ambiguity in the statutory

language at issue. *See Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1476, (D.N.J. 1985); *Sierra Club v. Raytheon*, 22 Env. Rep. Cases 1050, 1054 (D. Mass. 1984). The words "to be in violation" may reasonably be read as comprehending unlawful conduct that occurred solely prior to to the filing of the lawsuit as well as unlawful conduct that continues into the present. For example, a person who under-pays taxes one year remains "in violation" of the relevant tax laws, even though that person pays the proper amount of taxes for the following year. Similarly, a polluter that exceeds various discharge limitations in its NPDES permit, such as Gwaltney, arguably remains "in violation" with respect to those excesses, even though in subsequent years it brings itself into compliance. Indeed, its discharge violations remain on the records, and the effects of the excess discharges may linger well after they occur.

In addition to the ambiguity in the words "to be in violation" standing alone, other portions of Section 1365 suggest that Gwaltney's proffered construction is not the only—or the most—plausible one. Section 1365 states that:

> The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under [33 U.S.C. § 1319(d)].

33 U.S.C. § 1365(a). Section 1319(d) authorizes civil penalties "not to exceed $10,000 per day of . . . violation." 33 U.S.C. § 1319(d). Neither Section 1319(d) nor the citizen-suit provision itself expressly limits the imposition of such civil penalties to polluters that persist in their unlawful conduct up to the time the complaint is filed. On the contrary, the absence of any such limitation implies that Congress intended to authorize citizen suits to recover civil penalties based on a polluter's unlawful conduct in the past, regardless of whether the polluter has ceased its unlawful conduct by the time the

citizen suit is brought. In the Court's view, the statutory language, fairly read, suggests that the Act authorizes citizen suits for civil penalties based on unlawful conduct that occurred in the past, regardless of whether a polluter is in compliance when the suit is brought.

In view of the ambiguity of the statutory language, however, the Court has also reviewed relevant portions of the legislative history in order to better understand Congress's intent. The committee reports do not expressly address the issue at hand one way or another. They do, however, note that the statute authorizes the recovery of civil penalties in citizen suits. The reports do not discuss any requirement that such suits must be based on unlawful conduct occurring at the time the suit is filed. *See* H.Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 820 (1973) (hereinafter "Legislative History"); S.Rep. No. 414, 92d Cong., 1st Sess. 79, *reprinted in* 2 *Legislative History* at 1497. As already referred to, the absence of any discussion of such a requirement—in the context of acknowledging the general availability of civil penalties—implies that such a requirement was never contemplated.

The legislative history provides direct support, as well as support by implication, for the view that the Clean Water Act authorizes citizen suits based on unlawful conduct that occurred in the past regardless of whether the conduct continues through the time the complaint is filed. Senator Muskie, the manager in the Senate of the bill that added the citizen suit provision to the Act, stated:

> . . . a citizen has a right under Section 505 to bring an action for an appropriate remedy in the case of *any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.*

See 118 *Cong. Rec.* 33,700, *reprinted in* 1 *Legislative History* at 179 (emphasis added). Gwaltney acknowledges that Senator Muskie's remark supports plaintiff's position and undermines its own. But it attempts to eliminate the force of his explication by noting that it is the remark of only an individual legislator. To be sure, a court cannot allow colloquies among legislators to materially alter clear statutory language. *See, e.g., Regan v. Wald*, —— U.S. ——, ——, 52 U.S.L.W. 4966, 4970 (1984). But such is not the case here. Rather, Senator Muskie's remark lends further support to a plausible reading—and one which is uncontradicted by the statute itself and other legislative materials [7]—of ambiguous statutory language.

A reading of the citizen-suit provision that would authorize suits for civil penalties against polluters for past

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[7] Gwaltney also quotes a remark of Senator Bayh in support of its position. Senator Bayh's remark is as follows:

> These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws.

1 *Legislative History* at 221. Gwaltney argues that the fact that Senator Bayh did not mention civil penalties—and did mention injunctive relief—somehow indicates that Senator Muskie's explication was an inadvertent misstatement. The Court disagrees. Senator Bayh's statement hardly contradicts Senator Muskie's explication. It is, rather, an accurate statement of a citizen-enforcer's remedies under the Clean Water Act with respect to injunctions and money damages—and simply does not address the circumstances when a citizen suit for civil penalties may be maintained.

Gwaltney also calls attention to occasional references in the legislative history to "abatement" actions. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 79-82, *reprinted in* 2 *Legislative History* at 1497-1500. Such references, however, do not persuade the Court that abatement of continuing unlawful conduct was the only avenue of relief Congress contemplated when it authorized citizen suits under the Act. *See Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985).

unlawful conduct regardless of their compliance status when the suit is filed is also consistent with one of the primary policy objectives inherent in the concept of citizen suits: deterrence of violations. Indeed, unless citizens may sue for civil penalties in such circumstances, citizen suits would provide little, if any, additional incentive for polluters to comply with their discharge limitations until a citizen suit is actually commenced. *See also Monsanto, supra*, 600 F. Supp. at 1476-77; *Sierra Club v. Aluminum Company of America*, 585 F. Supp. 842, 854 (N.D.N.Y. 1984).

If citizen suits under the Act were limited to situations where the polluter is engaged in unlawful conduct when the suit is filed, the deterrence effect of citizen suits would also be undermined by the evidentiary difficulties citizen enforcers would fact in establishing that a polluter is currently discharging unlawfully. As the Senate Report recognized, one of the keys to the sucecssful functions of the Act's citizen suit provision is disclosure of a polluter's discharge information. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 81 (1971) *reprinted in* 2 *Legislative History* at 1499 ("The information and other disclosure provisions required throughout the bill are important to the operation of this provision."). And, indeed, Gwaltney's DMRs form the basis of this lawsuit. But, as plaintiffs have pointed out, such reports are not available until at least a month—and sometimes more—after the discharge occurs. Gwaltney's proffered construction of the Act would engage the litigants in discovery battles over whether a polluter is no longer discharging unlawfully; and it would engage the courts in a search for standards to apply in determining whether a polluter's conduct can fairly be viewed as continuing in violation. *See Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 399 (5th Cir. 1985) (Williams, J., concurring) (attempting to define what constitutes "in violation"); *Friends of the Earth v. Facet Enterprises, Inc.*, 22 Env. Rep. Cases 1143, 1145 n. 1 (W.D.N.Y.

1984) (". . . it is difficult for a plaintiff to verify that a violation is occurring at the very time that plaintiff is filing a notice of intent to sue. . . . I am not prepared to draw a line that Congress has not drawn, defining the point at which violations are sufficiently "recent" to form the basis of a citizen suit. To my mind, that line has been drawn already [by the relevant statute of limitations]."") Such a situation would also be contrary to Congress's understanding that citizen suits involve "manageable and precise benchmarks for enforcement." S.Rep. No. 92-414, 1st Sess. 81 (1971), *reprinted in* 2 *Legislative History* at 1499.[8]

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[8] The problem of determining whether a violation is a "continuing" one is highlighted well in this case. Plaintiffs filed this suit in mid-June of 1984. With a history of violations of its TKN limitations in the wintertime, Gwaltney had just experienced another winter of repeated violations of its TKN limitations, despite the changes it had implemented in its wastewater treatment system to address the problem. At the time of trial in December of 1984, one of Gwaltney's own witnesses—Mr. Sneed—expressed doubt as to whether Gwaltney would meet its TKN limitations. It was not until Gwaltney had experienced a full winter without problems that it could make its motion to dismiss based on its present compliance, with a secure belief that it was indeed in compliance. Thus, plaintiffs' allegation in the complaint, that Gwaltney was continuing to violate its NPDES permit when plaintiffs filed suit appears to have been made fully in good faith. On these facts, the Court believes that even if Gwaltney were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here. A useful analogy is the manner in which the federal courts treat the jurisdictional amount requirement in diversity cases. Gwaltney has raised this analogy in support of its position that the Court is without jurisdiction here. The Court disagrees, and concludes that the analogy supports the position that it does have jurisdiction here.

In diversity cases, the question whether the jurisdictional amount is satisfied—and whether the court, ultimately, has jurisdiction—is not answered by whether the plaintiff ultimately recovers in excess of $10,000. *See, e.g.*, 14A C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* § 3702 at 31-33, and cases cited (1985). Rather, the issue is whether the amount plaintiff *stated in the*

In light of the language of the Clean Water Act's citizen suit provision, its legislative history, and its underlying policy goals, the court concludes that the Clean Water Act authorizes citizen suits for civil penalties for violations of the Act, regardless of whether the polluter is engaged in unlawful conduct at the time the suit is filed or afterward. A number of other courts have recently reached the same conclusion. *See, e g., Monsanto, supra,* 600 F. Supp. at 1476-77; *Aluminum Company of America, supra,* 585 F. Supp. at 853-54; *Sierra Club v. Raytheon, supra,* 22 Env. Rep. Cases at 1054; *Student Public Interest Research Group of New Jersey v. Anchor Thread Co.,* 22 Env. Rep. Cases 1150, 1154 (D.N.J. 1984); *see also Student Public Interest Research Group of New Jersey v. Tenneco Polymers,* 602 F. Supp. 1394, 1398-99 (D.N.J. 1985); *Facet Enterprises, supra,* 22 Env. Rep. Cases at 1145 n.1.

Gwaltney is not, however, without authority for its position. It relies heavily on *Hamker v. Diamond Shamrock Chemical Co.,* 756 F.2d 392 (5th Cir. 1985). In that case, the Court of Appeals for the Fifth Circuit held that a person cannot maintain a citizen suit under the Clean Water Act unless the polluter's conduct is unlawful at the time the suit is filed, and cannot be brought for civil penalties for past violations. *Id.* at 396. This Court, respectfully, disagrees.

First, the Court notes that the panel concluded the statutory language is not sufficiently ambiguous to raise any question about its proper meaning. *See id.* at 395.

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original claim satisfies the amount, and is made in good faith. *See,* e.g., *Wiggins v. North Carolina Equit. Life Assur. Co.,* 644 F.2d 1014, 1016-17 (4th Cir. 1981). As Gwaltney recognizes, the test of good faith is whether it appears to be a "legal certainty" that the jurisdictional fact is not satisfied. *See St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 288-89 (1938); *Wiggins, supra,* 644 F.2d at 1016-17. But there was no certainty here—legal, factual, or otherwise—that Gwaltney's system would correct one of the two major violation problems for which this suit was brought—until nearly one year after the suit was filed.

As discussed *supra*, however, this Court—and several others—have examined the language without being able to resolve its plain meaning with the same degree of certainty.

Second, the *Hamker* panel reasoned that because the statutory scheme centers primary enforcement responsibility with the states and the Administrator of EPA, citizens are not authorized to sue polluters unless the polluter is engaged in ongoing unlawful conduct. *Id.* at 395-96. But this Court does not comprehend how the conclusion necessarily follows from the premise. For, even if the statute is construed to allow citizens to sue for past violations, primary enforcement responsibility remains with the states and the administrator: generally, citizens must first notify the states, the administrator, and the alleged polluter and wait sixty days to give public enforcement authorities the opportunity to act before proceeding. *See* 33 U.S.C. § 1365(b)(1)(A). The panel also reasoned that because the statute requires the citizen-enforcer to notify the violator—as well as enforcement authorities—of its intent to sue, the statute contemplates that a citizen loses the right to sue if the violator brings itself into compliance before the sixty days elapses, just as the citizen loses the right to sue if the governmental authorities commence prosecution in a court before sixty days elapses. *Id.* at 396. This reasoning is unpersuasive. The statute expressly provides that public enforcement within the sixty-day period precludes a citizen suit, *see* 33 U.S.C. § 1365(b)(1)(B), but does not anywhere state that the violator's compliance within the sixty-day period deprives a citizen of the right to sue. It thus appears inappropriate to infer that compliance by the violator carries the same consequences for citizen enforcement as initiation of a government enforcement action[9].

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[9] The Court also notes that the committee reports, as well as the statute itself, do not indicate that one of the purposes of the

Finally, the *Hamker* panel reasoned that construing the provision to preclude citizen suits for civil penalties based on past violations would promote the goal of limiting the burden on the federal courts. But this Court is not persuaded that such a construction would ultimately reduce the federal judiciary burden. If such a construction were adopted, citizen suit provisions would provide an incentive for compliance only in those specific cases where the citizen-enforcer actually files a notice of intent to sue and then a complaint. The threat of citizen suits would have little general deterrent effect. It is not unreasonable to presume that under such a system, noncompliance would be more widespread than under a system where it is clear that citizens can sue for civil penalties for past violations. If the number of citizen suits is related to the level of noncompliance—a reasonable assumption—then it may well be that the number of suits actually filed per period of time would be greater under a system in which citizens cannot sue for civil penalties for past violations.

In considering the persuasiveness of *Hamker*, this Court also notes that the *Hamker* panel did not address the legislative history militating against its construction of the statute. As discussed *supra*, the legislative history corroborates the view that citizens can sue for civil penalties for past violations.

Gwaltney also relies on *City of Evansville, Indiana v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom Louisville and Jefferson County Metropolitan Sewer District v. City of Evans-*

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sixty-day notice requirement is to give a violator the opportunity to come into compliance and avoid liability. *See* H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reported in* 1 *Legislative Histo.y*, at 820; S. Rep. No. 414, 92d Cong., 1st Sess. 79-80 (1971), *reprinted in* 2 *Legislative History* at 1497-98. Rather, the sole purpose appears to be to "encourage and provide for agency enforcement." S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 2 *Legislative History* at 1497.

ville, Indiana, 444 U.S. 1025 (1980). In that case, the Court of Appeals for the Seventh Circuit remarked that the Clean Water Act "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages." *Id.* at 1014. That remark, however, insofar as it can be said to address citizen suits for civil penalties for past violations, is only *dicta*. The issue in the case was whether citizen suits may be brought for damages. The panel did not at all analyze whether the statute authorizes citizen suits for civil penalties for past violations.[10] The case of *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 21 Env. Rep. Cases 1393 (D.R.I. 1984), which Gwaltney also cites, relies primarily on *City of Evansville* to reach its conclusion. *See id.* at 1394 (referring to cases cited in magistrate's decision, 21 Env. Rep. Cases 1390, 1391). Accordingly, the Court does not find the case to be persuasive.

Finally, Gwaltney relies on *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Gwaltney focuses on Justice Powell's observation that "this provision allows suits under the Act by private citizens, but authorizes only prospective relief. . . ." *Id.* at 6. This observation, however, like the remark of the Seventh Circuit in *City of Evansville*,

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[10] Plaintiffs argue that a case decided by the Court of Appeals for the Seventh Circuit subsequent to *City of Evansville* implicitly rejects the position with respect to citizen suits based on past violations that *City of Evansville* took. That case, *People of the State of Illinois v. Outboard Marine Corporation, Inc.*, 680 F.2d 473 (7th Cir. 1982), is not as on point as plaintiffs argue. The case does reflect the understanding that the United States can sue under the Clean Water Act for injunctive and other relief based on past discharges, regardless of a polluter's present compliance. *See id.* at 480-81. It also reflects the understanding that citizens may intervene in such cases. *Id.* at 480. It simply does not address the question whether citizens themselves can sue for civil penalties based on a polluter's unlawful conduct, that occurred entirely in the past, however.

arose in the context of whether a citizen enforcer may sue for damages. The Supreme Court, like the Seventh Circuit, concluded that one may not. Later in the opinion it did recognize that civil penalties are authorized in citizens suits. *See id.* at 14 n. 25. It had no occasion to consider or remark about whether a citizen enforcer may sue a polluter for civil penalties based on past violations.

III. Maximum Liability.

The number of days during which a polluter violates a limitation in its permit sets the polluter's maximum liability in civil penalties for violating that limitation. The subsection of the Clean Water Act authorizing civil penalties states that a polluter in violation of, among other things, permit limitations such as those forming the basis of this suit "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Determining the number of days involved in a given violation is thus an important aspect of assessing civil penalties. Determining whether, and in what circumstances, a polluter can be subjected to a penalty of greater than $10,000 per day for permit violations is also important. The parties dispute the law on both points.

A. Number of days involved for violating a monthly average. Gwaltney has violated its "monthly average" permit limitations for several substances on a number of occasions. The "monthly average" of a substance reflects the average amount (or concentration, where the substance is measured by concentration instead of by amount) of the substance discharged per day, based on an average of measurements taken for that substance over the course of a month. The monthly average for the pollutants at issue in this case is roughly half of the maximum daily amount allowed.[11] Gwaltney argues that

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[11] The average and maximum permit limitations for four of the pollutants at issue in this case read as follows on Gwaltney's DMR for May, 1984: (i) for TSS: 228.000 KG/D (daily average

a violation of a monthly average constitutes a single day of violation. Plaintiffs, on the other hand, maintain that a violation of a monthly average constitutes thirty days of violation.

As discussed above, the relevant section of the Clean Water Act authorizing civil penalties reads that: "any person who violates . . . any permit condition or limitation . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Thus, to determine the maximum authorized penalty for the violation of a monthly limitation, the Court must consider how many days are involved in such a violation. It is difficult for this Court to imagine how the violation of a monthly limitation involves any number of days other than the number of days in that month. Violating a monthly limitation, then, subjects a polluter to a maximum penalty of $300,000. Similarly, a violation of a weekly limitation would, it seems, necessarily involve seven days. At least one other district court has reached the same conclusion. *See United States v. Amoco*, 580 F.Supp. 1042, 1045 (W.D. Mo. 1984).

Although it cites neither cases nor legislative history in support of its position, Gwaltney contends that this conclusion is nevertheless wrong primarily because it believes it can be unjust.[12] To illustrate its point, Gwaltney

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over a month), 455.000 KG/D (daily maximum); (ii) for fecal coliform: 200.0000 N/CML (daily average over a month), 400.000 N/CML (daily maximum); (iii) for TKN: 109.0000 KG/D (daily average over a month), 219.0000 KG/D (daily maximum); (iv) for oil and grease: 78.0000 KG/D (daily average over a month), 156.0000 KG/D (daily maximum). For chlorine, (Cl_2), there was no average limitation: rather, a daily minimum (1.5000 MG/L) and maximum (2.5000 MG/L) were set.

[12] Gwaltney raises two other arguments against treating the violation of a monthly limitation as a thirty-day violation.

First, Gwaltney contends that to characterize a violation of a monthly limitation as thirty days of violation is contrary to the principle that penal statutes are to be construed strictly. *See,*

suggests a hypothetical: a polluter discharges, for twenty-nine days of a month, 98% of the amount that it must average each day in order to meet its monthly average; on the last day, however, the polluter discharges 180% of that amount. Because of the last day's discharge, the polluter would violate its monthly average; yet, if its permit allowed a daily maximum twice as great as the monthly average (as Gwaltney's does), the polluter would not have violated its daily maximum for the substance at all during the entire month. In Gwaltney's view, subjecting the polluter to thirty days' liability because of the monthly violation is unjust, especially in light of the fact that the polluter never exceeded its daily maximum.

The Court disagrees. Part of Gwaltney's argument is based on the suggestion that no real harm is being done where maximum daily limitations are not violated. But the mere fact that a daily maximum is not violated does not mean that the polluter's discharges are harmless.

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e.g., Commissioner of Internal Revenue v. Archer, 361 U.S. 87, 91 (1959). Adhering to this proposition does not affect the Court's conclusion. The words of the statute authorize a penalty of up to $10,000 "per day of such violation." Because a violation of a monthly limitation necessarily involves a violation over an entire month, a maximum penalty of $10,000 per day of the month is plainly within the words of the statute and therefore does not violate any principal of strict construction.

Second, Gwaltney argues that one of the stipulations, in conjunction with the plaintiffs' response to an interrogatory, precludes plaintiffs from arguing that Gwaltney's violation of a monthly limitation subjects Gwaltney to a penalty for every day of the month. The parties stipulated that 160 violations had occurred, and plaintiffs had indicated in response to an interrogatory that "the total dollar amount of civil penalties" they would seek would be "10,000 per violation." Some of the violations that were stipulated were, of course, violations of monthly limitations. Gwaltney is correct that plaintiffs now take a position on penalties that is technically inconsistent with their interrogatory response because they said "$10,000 per violation" instead of "$10,000 per day of each violation." But such an event, parties' responses to interrogatories do not preclude this Court from imposing appropriate penalties.

Daily maximums for the pollutants at issue are no doubt more lenient than the monthly average because the environment may be able to absorb a relatively high discharge in a single day without incident—while a substantially lower discharge over the course of a month may present an environmental problem. In any event, the water pollution authorities have established the allowable discharge levels for various time intervals in order to ensure that water quality standards are met. It is not for the district court to decide, in a citizen suit proceeding, that a permit limitation an agency has fixed is unnecessary.

Another part of Gwaltney's argument is based on the fact that only on one day did its hypothetical polluter exceed the amount that it needed to maintain each day in order to meet the month's average. But this too is unpersuasive. The average is based on discharges over the entire month. When a polluter violates a monthly average, every day of its discharges contributes to the violation, even if most of the discharges are within the average that the polluter needs to maintain in order to stay within the monthly limitation.[13]

The problem with Gwaltney's position is further illustrated when one considers a counter-hypothetical: the polluter nearly exceeds—but does not pass—its daily maximum every day of a month. Such a polluter would

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[13] Gwaltney also suggests that its violations of a monthly average cannot be presumed to be a violation during every day of the month, because the average may be computed based on measurements taken less frequently than every day. The Court recognizes that Gwaltney's permit requires it to monitor many of its discharges only three days per week, rather than every day. But even though those periodic tests do not establish with absolute certainty that Gwaltney's actual monthly average exceeded the permitted amount, it is nevertheless reasonable to presume that they do establish such a monthly violation—especially in light of Gwaltney's failure to introduce more accurate evidence to the contrary.

far exceed the monthly average, and would be liable for violating that limitation. But Gwaltney's position, if adopted, would constrain a court to treat such conduct as one single day of violation, thereby preventing a court from imposing over $10,000 in penalties for a full month of substantial discharges. Such a limitation does not strike this Court as a sensible one, much less as consistent with the statute.

Ultimately, the district court has discretion to determine the appropriate penalty under Section 1319(d) for a day of violation. As the district court noted in *Amoco*, merely because a polluter is subject to $300,000 in penalties for violating a monthly standard does not necessarily mean that those penalties will be imposed. *See Amoco*, *supra*, 580 F. Supp. at 1045. The $300,000 is a maximum penalty under the statute, not a mandatory one. *See* 33 U.S.C. § 1319(d). Thus, the district court can consider any appropriate factors in arriving at a penalty. But it ought not to have its hands tied, when crafting a penalty for a violation of a monthly limitation, by a $10,000 limit.

B. Maximum penalty per day where multiple violations occur within a day. In some instances, Gwaltney violated discharge limitations for several substances on the same day. Gwaltney argues that the Clean Water Act limits its liability to $10,000 per day, regardless of the number of its violations on a given day. Plaintiffs, on the other hand, argue that the Act only limits a permittee's liability to $10,000 per day per violation of the discharge limitations on a given substance.

The relevant statutory provision states that:

> Any person who violates . . . any permit condition or limitation [implementing any of several enumerated sections of the Clean Water Act, in a permit such as Gwaltney's NPDES permit] . . . shall be

> subject to a civil penalty not to exceed $10,000 per-day of such violation.

33 U.S.C. § 1319(d). There is no question here that Gwaltney's NPDES permit is a type of permit encompassed under this subsection. Nor is there any question that all of the limitations at issue in Gwaltney's permit are limitations implementing sections of the Clean Water Act enumerated in Section 1319(d). The parties merely dispute the proper construction of the phrase "$10,000 per day of such violation."

Gwaltney relies on *United States v. Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975). In that case, the district court rejected the view that 33 U.S.C. § 1319(d) can be read to authorize "$10,000 per violation per day." *Id.* at 738. The district court first concluded that the statutory language is ambiguous. *See id.* at 736. It next reviewed the legislative history and found references to the Act's authorizing penalties up to "$10,000 per day" and "$10,000 per day of violation," without any use of the words "of such violation." *See id.* at 737. It also concluded that $10,000 per day as an absolute maximum provides an adequate deterrent, and is consistent with other provisions of the Clean Water Act. *See id.* at 736-37.

Plaintiffs suggest that the appropriate reading of Section 1319(d)—and what the *Detrex* court intended—was that Section 1319(d) establishes a maximum daily penalty of $10,000 for violating the limitations on any given *substance*, not an absolute daily maximum. For example, if a polluter violates its limitations for fecal coliform as well as for TKN on the same day, it is subject to a maximum civil penalty of $20,000, not $10,000. On the other hand, if the polluter violates two different limitations—such as the monthly average and the daily maximum—for TKN only, on a given day, it is subject to no more than $10,000 in civil penalties for that day of violation. They rely on *dicta* in a recent district court case,

United States v. Amoco Oil Co., 580 F. Supp. 1042, 1046-47 n.1 (W.D. Mo. 1984) to support their belief that the *Detrex* holding can be harmonized with this construction of Section 1319(d), and that this construction is indeed the correct one. In *Amoco*, the district judge remarked that "a good argument can be made for the idea that violations of the daily limit for two or more *different effluents* should be subjected to separate penalties." *Id.* at 1047 n.1 (emphasis original).

The Court does not believe that *Detrex* can be harmonized with the plaintiffs' and the *Amoco* court's construction of Section 1319(d). Indeed, the district judge in *Amoco* acknowledged that "there are indications" that *Detrex* cannot be harmonized with his own (and plaintiffs') proffered construction. *Amoco*, *supra*, 580 F. Supp. at 1047 n.1. In order to harmonize the two, plaintiffs correctly point out that the reported opinion in *Detrex* does not indicate whether the multiple violations per day that were at issue involved the same substance or different ones. They suggest that the "multiple per day violations" that the case addressed may have involved repeated violations on the same day of an hourly limitation for a single substance. This may be true, of course. But whether or not the facts were as limited as plaintiffs suggest, the *Detrex* court clearly contemplated the issue in terms of an absolute maximum penalty per day, regardless of whether the limitations violated were for the same or different substances:

> . . . a $10,000 per day civil penalty, regardless of the number of violations of § 1311, 1312, 1316, 1317, or 1318 of Title 33 or of any permit condition or limitation or of any order of the E.P.A. more than adequately effectuates the Congressional purpose of a "real" threat of sanction.

Detrex, *supra*, 393 F. Supp. at 738.

The Court concludes that the *Detrex* court's construction is the appropriate one. Section 1319(d) authorizes

a maximum of $10,000 per day in civil penalties for violations that are enumerated therein, even where the defendant has violated discharge limitations for several substances during the same day.

In view of the contrary suggestion in *Amoco*, it may be helpful to explain the Court's reasoning further. As the *Detrex* court remarked, the statute itself is ambiguous. To elaborate on this, the words "$10,000 per day of such violation" may be read, as plaintiffs would suggest, to mean "$10,000 per day per each violation." On the other hand, the words may also be read as indicating how the number of days for a maximum civil penalty of $10,000 can be imposed should be computed: that is, to clarify that the maximum civil penalty may be imposed for each day of an enumerated violation—rather than, for example, being limited to the day on which a violation is reported, or to the day on which the Administrator gives an order that the defendant violates, or to the days on which the defendant violates some provision of the Clean Water Act beside the enumerated ones. All of these alternate readings may have been at least arguable if the statute had ended with the words "$10,000 per day," omitting the words "of such violation."

In view of the ambiguity in the statute itself, the *Detrex* court examined the legislative history and found several indications that Congress intended to authorize an absolute daily maximum. *See Detrex, supra*, 393 F. Supp. at 737. The Court need not elaborate further on this point, nor on the other reasons for this construction that *Detrex* discusses. Plaintiffs do not raise any persuasive reasons for choosing their construction over the one that Gwaltney has offered and that the *Detrex* court and this Court find to be correct. Their primary argument is based on the language of Section 1319(d) itself and the fact that the *Amoco* court, in *dicta*, suggested the same reading based on that language. As the Court has already demonstrated, however, that language is amen-

able to various other readings as well. Plaintiffs provide no legislative history in support of their position. And their primary policy argument is that deterrence is better effectuated by their position. This, however, is unclear. A maximum penalty of $10,000 per day may amount to a substantial deterrent against violations by even the largest corporations where more than a few days of violation are involved, as will be come clear *infra*. The Court is satisfied that its construction of Section 1319(d) accurately reflects the intent of Congress.

C. Maximum civil penalty applicable to Gwaltney. In light of the foregoing principles for calculating days of violation, the Court is now able to determine the number of days for which Gwaltney is, in its view, subject to a $10,000 maximum penalty. The parties have stipulated to the number of violations, based on Gwaltney's DMRs from November, 1981 to August, 1984. Copies of the DMRs themselves are also in evidence. The DMRs reflect which of the stipulated violations involve monthly limitations, and which ones involve daily limitations. The Court has summarized Gwaltney's violations in Appendix A.

During twenty-two of the thirty-three months for which are in evidence, Gwaltney violated the monthly average for at least one substance. During these same months, Gwaltney almost always violated more than one daily maximum or monthly average limitation. But under the principles discussed above, Gwaltney is subject to no more than $10,000 per day of violation, regardless of how many violations occurred on that day. There were 653 days in those twenty-two months;[14] thus, there were 653 days of violation. For those days of violation, Gwaltney is subject to a maximum penalty of $6,530,000.

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[14] Actually, a total of 669 days are in the twenty-two months involved. The parties have stipulated, however, that during the last of those 22 months—May, 1984—no violations occurred after May 15. Accordingly, the Court has treated Gwaltney's violation of its May, 1984 monthly average for TKN as involving only 15 days of violation.

In addition, Gwaltney violated daily limitations during five months when it reported no violation of monthly averages. In July 1982 it violated two limitations; it also violated two limitations during each of the three months following. Finally, Gwaltney violated five daily maximum limitations in February, 1984, making a total of 13 violations of daily standards during months when no violations of monthly averages occurred.

The DMRs do not indicate on which day of the month a given violation occurred, however. Therefore, it is impossible for the Court to discern whether any of these daily violations occurred on the same days. Conceivably, there were as few as seven different days of violation.[15] Plaintiffs have not demonstrated that each of these thirteen violations of daily standards occurred on different days.

The Court nevertheless believes that it is reasonable to presume that each of these did occur on a different day. Gwaltney has contended throughout this litigation that it is subject to a maximum penalty of $10,000 for a given day of violation, regardless of how many violations occurred on that day. Gwaltney also has complete access to any relevant records, so that it could have presented evidence to show that any of the violations occurred on the same day, if such evidence indeed existed. In the absence of such evidence, the Court concludes that Gwaltney's violations during those five months occurred on

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[15] In July 1982, for example, there was one fecal coliform violation and one chlorine violation. Those violations could have occurred on the same day, because tests for fecal coliform were performed three times per week, and tests for chlorine were performed hourly, according to the DMRs. Each of the two reported chlorine violations in August, September, and October, 1984, could have occurred on the same day because chlorine was tested on an hourly basis.

In February 1984, the single TKN violation and the two fecal coliform violations could have occurred on the same days as the three oil and grease violations. Tests for all three substances were performed three days per week, according to the DMRs.

thirteen different days. These violations increase Gwaltney's maximum liability in civil penalties by $130,000. Adding this to the maximum penalty for the months when Gwaltney violated monthly standards, $6,660,000 is the maximum civil penalty to which Gwaltney is subject.

IV. Gwaltney's Penalty.

As the Court has already discussed, the penalty of $10,000 per day of violation authorized by Section 1319 (d) is a maximum penalty, not a mandatory one. The Court now faces the task of determining the actual penalty, within the statutory limits, that Gwaltney shall be assessed. The parties differ markedly on this point. Plaintiffs urge the Court to impose the statutory maximum: here, as the Court has discussed, over $6,000,000. Gwaltney argues that a far smaller amount ought to be assessed: somewhere between $12,000 and $20,000.

Despite their widely varying estimates of the appropriate penalty, the parties agree that the United States EPA's civil penalty policy, *see* Environmental Protection Agency Civil Penalty Policy, [Federal Laws] *Env't Rep.* (BNA) 41:2991 (June 1, 1984) (hereinafter cited as "EPA Penalty Policy"), is an appropriate guideline for determining the amount of Gwaltney's penalty. Neither of the parties argue that the policy binds the Court. Nor indeed does it. Nevertheless, both parties suggest—and the Court agrees—that EPA's penalty policy provides a helpful analytical framework for arriving at a civil penalty. It is especially useful in light of the substantial maximum penalty that the statute authorizes, on the one hand, and the total absence of guidance Congress has provided in assessing penalties pursuant to Section 1319 (d), on the other hand. *Cf.* Clean Water Act § 311(b)(6), 33 U.S.C. § 1321(b)(6) (in determining the amount of the penalty for types of violations of the Clean Water Act not at issue in this case, the following factors shall be considered: the size of the business involved; the effect of the penalty on the business' ability to continue; and the gravity of the violation). Finally, there are

few cases that explain in any detail how they arrive at a penalty amount under Section 1319(d).

A. The EPA Penalty Policy. The policy aims at two general goals: (i) deterrence; and (ii) "fair and equitable treatment of the regulated community." *See* EPA Penalty Policy, 41:2992-93. As for deterrence, the policy recognizes that both deterrence of future violations by the violator (specific deterrence) and by other regulated firms (general deterrence) is important. *See id.* at 41:2992. For deterrence purposes, the policy recommends a penalty that includes two components. First, it should include the "economic benefit of non-compliance"; otherwise, the violator and potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance. *See id.* Second, the penalty should include an additional amount, which the policy characterizes as a "gravity component." If the penalty were limited to the economic benefit of non-compliance, regulated firms would find that they would have nothing to lose by non-compliance because a penalty for their violations would make them no worse off than if they had complied in a timely way. *See id.* The policy suggests that the gravity component reflect both the seriousness of the violation and—where extensive non-compliance with a regulatory program exists in an area—an additional amount to promote general deterrence purposes. *See id.*

Once an appropriate penalty for deterrence purposes has been estimated, the policy recommends that this "preliminary deterrence amount" be adjusted to ensure that the "regulated community" is fairly treated. *See* EPA Penalty Policy at 41:2992. The policy identifies a variety of factors that ought to be accounted for in arriving at a final civil penalty. Such factors include the degree of willfulness or negligence involved, the degree of cooperation involved, the violator's history of non-compliance, and whether the penalty would force the violator out of business. *See* EPA Penalty Policy at 41:3000-02.

B. Gwaltney's violations. Although the parties have stipulated to over 160 different violations involving five different substances, the Court shall consider two distinct compliance problems in arriving at Gwaltney's penalty. Each problem related to a specific pollution control method at the plant. Inadequacies in one method or the other account for virtually all of the violations at issue here.

1. Chlorination problems. From November, 1981 to October, 1982, Gwaltney experienced problems with its chlorination process. These problems caused Gwaltney's violations of its fecal coliform and chlorine limitations during that time. Fecal coliform, a type of microbe associated with human and animal feces, is a good indicator of the safety of water for drinking, swimming, and shellfish harvesting. Gwaltney's permit includes both monthly average and daily maximum limitations on its discharges of fecal coliform. Chlorine is a toxic chemical that the state requires Gwaltney to use—in appropriate concentrations—to kill fecal coliform. Chlorine also kills other life forms where its concentration is high enough, however. Thus, Gwaltney's NPDES permit imposes daily maximum as well as minimum limitations on the concentration of its chlorine discharges. From July, 1981 (before Gwaltney bought the plant) until October, 1982, the plant chronically violated its permit limits for fecal coliform and chlorine. These violations were due to both insufficient and excessive exposure of Gwaltney's waste-water to chlorine.

Gwaltney knew that its plant had a chlorine problem prior to purchasing the plant from ITT-Gwaltney in October, 1981. ITT-Gwaltney had taken the initial step of purchasing a new chlorinator, which Gwaltney believed would correct the chlorine and fecal violations. After a period of nearly one year from the takeover date, Gwaltney finally resolved the chlorination problems at its plant. At no time did Gwaltney seek outside assistance from independent consultants in analyzing the causes or the extent of its chlorination problems.

a. *Economic benefits.* The Court first considers the economic benefits that accrued to Gwaltney as a result of the delay in the plant's having a chlorination system that would meet the chlorine and fecal coliform limitations. The Court feels compelled to ensure that Gwaltney receives no economic benefit whatever from its delay in having a properly operating chlorination system.

Determining with precision a firm's economic benefit from noncompliance is not a simple matter. As EPA's penalty policy points out, there are at least three distinct types of economic benefits that a violator may enjoy as a result of its violation. *See* EPA Penalty Policy at 41:2996-97. First, by delaying the expenditure of funds on compliance, a violator obtains the use of the money for other purposes in the meantime. Second, a violator may also avoid some costs altogether—for example, the costs of maintaining and operating the pollution control system until it is implemented. Third, a violator may, in addition, obtain a competitive advantage as a result of its violation—for example, it may be able to offer goods at a lower price, thereby possibly increasing its sales and profits. While these different types of benefit are not difficult to understand in the abstract, determining their amounts is more complicated. Indeed, proving the extent of some of these types of economic benefits will often be impossible; thus, any objective formulation of economic benefits is likely to underestimate that benefit. The Court need not painstakingly determine such an amount, however. The purposes behind including an economic benefit component in a penalty assessment are to ensure that the violator disgorges at least its economic benefit, while also providing some objective basis for at least part of the penalty assessment. In light of these purposes and the difficulty of demonstrating all elements of economic benefit, the Court shall incorporate any objective evidence to arrive at what it hopes is a rational estimate of Gwaltney's economic benefit, resolving uncertainties in favor of a higher estimate.

Gwaltney offered evidence addressing primarily the first type of economic benefit: the benefit accruing from delaying its expenditures. Gwaltney indicated that its net cost for the changes in the chlorination system was $11,560. This amount is undisputed. In order to determine Gwaltney's economic benefit from delaying its expenditure, one must also know the length of the delay and the value of not incurring that expenditure.

Gwaltney attempted to demonstrate at trial that it could not have implemented the necessary improvements in the chlorination system any more than four months earlier than it actually did. Gwaltney argues that its economic benefit from delay should therefore be computed based on this four-month period. The Court, however, believes that the period of benefit for computing the economic benefit of delayed compliance should run for the entire time during which the violator is out of compliance because of its chlorination problems: here, twelve months. The Court recognizes, of course, that Gwaltney could not have accomplished the necessary changes instanteously upon discovering the chlorination problems. Indeed, Gwaltney's suggestion that six months was an appropriate, reasonable period for implementing a fully complying chlorination system may be correct. But this does not change the fact that if the expenditures had been made in time to prevent any violations at all, then Gwaltney would have incurred all the expenditures prior to the noncompliance period.[14] The Court also notes that its approach for computing the benefit period comports with that of the EPA's penalty policy. *See* EPA Penalty Policy at 41:2996.

Gwaltney argues that its actual rate of interest on borrowed funds during this period should be used to

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[14] The fact that in the circumstances of this case another firm —ITT-Gwaltney, rather than defendant—owned the plant at the time such expenditures would have been incurred does not alter this conclusion. Presumably the cost of such improvements would have been reflected in the sale price that defendant would have paid for the plant.

calculate its economic benefit from delayed compliance. It adduced evidence that during the relevant period this rate was 13%. Plaintiffs, on the other hand, computed Gwaltney's economic benefit from delay using a rate of 18.17%, which is the ten-year rate of return on equity earned by Smithfield Foods, Inc.—Gwaltney's parent corporation. At least in these circumstances, the Court believes that 13%—the actual interest rate Gwaltney itself paid on borrowed funds—is a more accurate basis for determining Gwaltney's economic benefit from delay.[17]

Given Gwaltney's rate of interest, its period of delay compliance because of chlorination problems, and the amount of investment involved, the Court can determine at least the portion of economic benefit accruing to Gwaltney because of the delay in expending funds on the chlorination system. That amount is approximately $1,500.[18] While this amount is probably less than Gwalt-

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[17] Plaintiffs cite *Ohio ex rel. Brown v. Dayton Malleable, Inc.*, 13 E.R.C. 2189, 2194 (Ohio Ct. C.P. 1979), *aff'd*, 438 N.E. 2d 120 (Ohio 1982), for the proposition that the historic return on equity is the appropriate rate. But in that case, which involved penalty assessments under an Ohio water pollution statute, apparently no one contended that the defendant's own rate of interest ought to be used. Rather, the choice before the Court was between the polluter's actual rate of return and "some outside standard." *Dayton Malleable*, 13 E.R.C. at 194. The Court rejected the latter. Here, plaintiffs' proposed rate—not the rate proposed by Gwaltney—is more accurately described as the "outside standard": it is based on the parent's rate of return; not Gwaltney's; and it runs over a ten-year period, not the years in question.

[18] Gwaltney's annual rate of return (13%) multiplied by the amount of investment involved ($11,560) multiplied by the number of years of non-compliance (1.0).

In its proposed calculations, Gwaltney, like the Court, calculates its benefit from delay on the entire amount of investment involved: $11,560. Gwaltney claims that this is a generous concession on its part, because the money was actually expended over the course of the improvements, which while the calculation is based on the fiction that the money was spent in a lump sum at the end of the improvements—facilitating the computation but distorting the reality. The

ney's total economic benefit, the Court has no basis for rationally arriving at a figure any larger. In view of the rest of the penalty that Gwaltney shall be assessed, however, the Court has no doubt that Gwaltney shall disgorge any economic benefit of its non-compliance.

b. *Gravity component.* Gwaltney argues that there is no reason to impose a penalty with an adjusted gravity component of more than $4,900. Gwaltney's suggested gravity component covers all the violations at issue in this case, including its violations resulting from its chlorination problems.

The actual and potential environmental harm associated with a violation is an important factor, under the EPA's penalty policy, in arriving at the gravity component. *See* EPA Penalty Policy at 41:2999. The Court agrees. In connection with the environmental harm of its fecal coliform violation, Gwaltney recognizes that the presence of fecal coliform has led the state to generally prohibit the taking of shellfish for human consumption from much of the Pagan River. Gwaltney attempts to minimize the seriousness of its fecal coliform violations, however, by pointing out that the state—in certain circumstances—nevertheless allows oysters and clams from those same parts of the Pagan River to be sold for human consumption in their uncooked state. Further, Gwaltney argues that the Pagan River's condition with respect to fecal coliform could not be improved for shellfish harvesting even if Gwaltney constantly complied with the fecal coliform limitations in its permit. Gwaltney also attempts to minimize the seriousness of its fecal coliform violations by noting that the State has not abso-

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Court agrees that a fiction is involved, but disagrees that it distorts Gwaltney's economic benefits from delay. If the expenditures had been incurred in time to improve the system before the violations occurred, it is reasonable to presume that each of the expenditures would have been incurred about a year before it was actually incurred. Thus, it is appropriate to calculate Gwaltney's benefit on the entire amount expended based on one year's time.

lutely forbidden the discharge of fecal coliform; rather, the State has only limited such discharge.

In the Court's view, Gwaltney trivializes the seriousness of its fecal coliform violations. To begin with, an EPA summary of the effects of the fecal coliform indicates that increased levels of fecal coliform in waters used for recreational swimming and shellfish harvesting pose health hazards to human beings, and act as a medium of disease transmission for a variety of diseases.[19] In light of this, the Court finds Gwaltney's characterization of is violations as posing "no threat whatever to the public health" to be nothing less than offensive.

Further, the Court notes that Gwaltney's fecal coliform violations were not *de minimus*. Gwaltney violated its daily maximum—by four to seven times the permitted amount—on at least six occasions, according to the DMRs; and during five out of the seven months when Gwaltney exceeded its monthly average for fecal coilform, it exceeded the monthly average by 58% to 150%. Finally, the Court notes that Gwaltney experienced fecal coliform problems almost continuously from November, 1981 to July, 1982. It is true, of course, that the Pagan River was not a virgin stream before Gwaltney exceeded its permit limitations for fecal coliform; Gwaltney's fecal coliform violations were not responsible for spoiling the river. But the fact that a river already suffers from poor water quality hardly excuses a polluter's violation. Indeed, in view of the fact that the Clean Water Act aims to restore the waters of the United States as well as to prevent the degradation of unpolluted waters, *see* 33 U.S.C. § 1251, violations that impede the restoration of water quality ought not to be treated lightly. Considering all these factors, the Court believes that the "gravity component" of Gwaltney's penalty should include $4,000 per day of fecal coliform violations arising

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[19] This EPA summary is a joint exhibit to which the parties stipulated.

out of Gwaltney's chlorination problems. A total of 213 days are involved.[26]

Gwaltney's problems with its chlorination system resulted in violations of its chlorine standards as well as of its fecal coliform standards. The parties have stipulated that at least half of Gwaltney's 34 chlorine violations involved minimum standards, however, not maximum ones. The only possible harmful environmental effect from violating a minimum chlorine standard, according to the evidence, is that fecal coliform limitations may be exceeded. The Court has already considered the environmental harm from Gwaltney's fecal coliform violations. It sees no reason to increase the gravity component because of Gwaltney's violations of its minimum chlorine standards.

Gwaltney's violations of its maximum chlorine standards are a different matter, though. Chlorine is a toxic pollutant, and in certain concentrations kills a variety of marine life. Gwaltney correctly points out that it is required to use chlorine in its waste-water treatment and has even been required to maintain a minimum level of chlorine in its effluent. Gwaltney also points out that apparently no fish kills on the Pagan River occurred during the entire period of its noncompliance. The Court nevertheless believes that a non-trivial amount should be added to the gravity component of Gwaltney's penalty to account for its chlorine violations. The gravity component should account for risk of environmental harm as well as for any actual environmental harm. During ten of the twelve months when Gwaltney experienced problems with its chlorination system, it exceeded its maximum chlorine limitations on some seventeen occasions. Although most

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[26] Gwaltney violated its monthly average for fecal coliform in November and December, 1981, and from February to June, 1982; it also violated daily maximums on one occasion in January, 1982 and on one occasion in July, 1982. This amounts to 213 days of violation.

of these violations were not grossly excessive,[21] two involved discharges that were double the permitted concentration. Considering these factors, the Court deems it appropriate to include in the gravity component of Gwaltney's penalty an amount of $1,000 for each of the seventeen days of violation of its maximum chlorine limitation.

3. *Adjustments.* Gwaltney argues that its penalty ought to be adjusted downward to account for a variety of factors. Under EPA's civil penalty policy, a violator's willfulness or negligence—or lack thereof—is one factor to consider in arriving at a final penalty amount. *See* EPA Penalty Policy at 41:3000. Of course, liability under Section 1319(d) is strict. *See, e.g. United States v. Amoco, supra*, 580 F. Supp. at 1050. But willfulness is nevertheless relevant to the amount of penalty. *See id.*

Gwaltney argues that its conduct should not be characterized as willful merely because it did not shut down its facility in the face of admitted knowledge that chlorination problems at its plant were causing permit violations even before Gwaltney took over the plant. In support of that proposition, Gwaltney suggests that it had no "absolute statutory obligation" to close its plant or slow its production, absent "imminent and substantial endangerment to health or welfare." Gwaltney's premise does not support its conclusion, however. Even if it had no "absolute statutory obligation" to close its plant or slow its production, Gwaltney's failure to take any such measures, in the face of undisputed knowledge that continued operation would result in continued violations, reflects a certain degree of willfulness. The Court need not decide whether it is the sort of willfulness that ought to result in an increased penalty, though, because the evidence reflects that Gwaltney dealt with its chlorination

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[21] Gwaltney's permit allowed discharges with a maximum chlorine concentration of 2.5 mg./l. and a minimum of 1.5 mg./l. It appears that 11 of Gwaltney's 17 violations of its maximum chlorine limitations involved discharges with a chlorine concentration under 3.2 mg./l.

problems in an exceedingly unconcerned manner. While Gwaltney may not have had any control whatever in the chlorination problem's first arising, it did exercise considerable control over the time involved in correcting that problem, and its attitude borders on benign neglect.

The first shipment of parts for the new chlorinator that Gwaltney believed would solve its problems did not arrive until December, 1981; yet, the problem had arisen in August, and ITT-Gwaltney had ordered the parts in September. The record does not reflect any effort by Gwaltney to speed up the arrival. A crucial component for maintaining the proper chlorine flow—an automatic valve—was missing from the December shipment and had to be back-ordered; this part did not arrive until March 16, 1982. The record does not reflect any efforts by Gwaltney to speed up this arrival, either. Every witness who was asked indicated that the chlorination problems arising from the lack of an automatic valve could have been handled manually. It would not have been easy—but it was possible. The record does not reflect any special effort by Gwaltney to control the problem manually. Further, Gwaltney's engineers suspected—correctly, as it turned out—other problems with the chlorination system besides the chlorinator itself. A supplier first sent the wrong dyes for testing those suspicions. Gwaltney did not obtain the proper dyes until ten days later, despite virtually uncontradicted testimony that the necessary dye is commonly available. Through all this, Gwaltney did not seek any outside advice to assist it in determining the precise nature and extent of its chlorination problems.

Contrary to Gwaltney's contentions, the Court believes that Gwaltney's penalty ought to be increased, not reduced, because of willfulness. Gwaltney's lackadaisical approach in correcting a problem that posed risks—albeit not "imminent" ones—to both human health and aquatic life should not be countenanced. One may speculate how long Gwaltney would have taken to repair a machine the faulty operation of which would have halted production.

It is reasonable, in the Court's view, to conclude that at the very least Gwaltney would have exerted more effort to repair such a machine than it did to bring its discharges into compliance with pollution standards. Gwaltney acknowledges that the evidence supports the conclusion that it could have reduced the compliance time by 125 days. The Court agrees, and shall increase the penalty by $1,000 per day that Gwaltney could have eliminated in correcting the problem.

Gwaltney argues that its penalty should also be reduced because of its cooperation in controlling its chlorination problem.[22] It is apparently true that Gwaltney corrected its chlorination problems without the threat of a lawsuit from anybody to prod it along. In that sense, Gwaltney was not uncooperative. But the Court finds it inappropriate to give Gwaltney credit for correcting violations for which Gwaltney plainly knew it was responsible.

Gwaltney's final argument for reducing any penalty it will be assessed is its purported inability to pay a substantial penalty. EPA's penalty policy is, generally, not to request a penalty that is "clearly beyond the means of the violator." *See* EPA Penalty Policy at 41:3002. Gwaltney characterizes its own "profit margin" as "extremely thin." It suggests that its penalty should be fashioned in light of this fact. The Court disagrees, being unpersuaded that any penalty warranted by Gwaltney's violations would jeopardize Gwaltney's continued operation.[23]

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[22] Gwaltney also suggests that its cooperation is reflected by its self-reporting of violations, and intimates that under EPA's penalty policy this should result in a mitigation of its penalty. Gwaltney is legally required to report its violations, however *see supra* note 3. Thus, the Court shall not mitigate Gwaltney's penalty on account of its self-reporting. This approach accords with EPA's policy. *See* EPA Penalty Policy at 41:3000 ("*assuming such self-reporting is not required by law*, such behavior should result in the mitigation of any penalty.") (emphasis added).

[23] Although Gwaltney's income statement for the year ending April 29, 1984, reflects an after-tax loss of $247,000, this loss must

In light of Gwaltney's economic benefit, the gravity component, and appropriate adjustments, Gwaltney's total penalty for the violations arising out of its chlorination problems is $995,500.[24]

2. *Biological treatment system.* Gwaltney's second source of compliance problems was its biological treatment system. Inadequacies in that system led to repeated violations of Gwaltney's TKN limitations during the winter months early in 1982 and the winter months of 1982-83. Gwaltney also experienced violations of its permit limitations for TKN and other substances during the winter and spring of 1983-84, in connection with the start-up of its new biological treatment system.

TKN is a nitrogen compound that can degrade a river by depleting its oxygen supply. Natural chemical and biological processes, involving TKN and bacteria in the river, transpire after TKN is added to a river. Those processes consume the dissolved oxygen in a river, to the detriment of many forms of river life. Gwaltney knew before it purchased the plant that its biological treatment system had resulted in TKN violations the previous winter. It did not take any steps of its own to address the problem until late May, 1982—well after it experienced TKN violations during the first winter that it was

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be considered in light of Gwaltney's extraordinary loss during the same year of 1.8 million dollars on the disposition of a plant. Gwaltney is clearly earning a substantial dollar amount on its operations, regardless of whether its profit margin is "thin."

[24] This amount is computed as follows:

—economic benefit:	$ 1,500
—gravity-fecal coliform ($4,000 x 213 days of violation):	852,000
—gravity-chlorine ($1,000 x 17 days of violation of maximum limit):	17,000
—adjustment for delay ($1,000 x 125 days of delay):	125,000
	$995,500

operating the plant. Over the following two years, in conjunction with the advice and approval of a consulting firm and the State Water Control Board (SWCB), Gwaltney devised and implemented a variety of changes in its biological treatment system. It submitted a proposed plan to the SWCB on January 5, 1983, which the SWCB approved on May 31 of the same year. By mid-October, construction was completed. Although Gwaltney experienced a number of violations during the system's start-up period, it experienced no violations after May 15, 1984, up to the time of trial in mid-December, 1984. Some experts did testify, though, that they were uncertain whether the new system would meet the permit limitations for TKN during the remainder of the winter.

a. Economic benefit. As with its chlorination system, the only evidence about Gwaltney's economic benefit from non-compliance concerns the value of delaying the necessary expenditures. Gwaltney's evidence is that its expenditure amounted to $159,745. The Court's computation of Gwaltney's economic benefit shall be based on this amount.[25]

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[25] Plaintiffs argue that Gwaltney's benefit from delayed expenditures should be based on a much larger amount. They point out that Gwaltney's consultants outlined a "permanent solution" to Gwaltney's biological treatment problems, at an estimated cost of $506,000, and that Gwaltney chose instead to implement a modified version of the "interim solution," which was considerably less expensive. Plaintiffs argue that Gwaltney's economic benefit constitutes the difference between the "permanent solution" and the amount Gwaltney actually expended.

This aproach is incorrect. Gwaltney's benefit from delaying expenditures is the benefit from delaying those expenditures that are necessary to achieve compliance. Gwaltney appears to have achieved compliance on the expenditures it has already incurred on its biological treatment system.

Although some of the testimony suggests that the modifications Gwaltney made in its treatment may not result in compliance with its TKN limitations, the Court believes it would be too speculative to reach that conclusion on the present record.

The period over which a violator's economic benefit should be computed runs from the date of non-compliance until the date of compliance, or the date on which compliance may reasonably be expected, as discussed above. The compliance problems arising out of the plant's biological treatment system commenced, for Gwaltney, in January 1982. They were not rectified until May 15, 1984.[26] This is a period of two years and over four months, or 2.37 years.

The rate at which Gwaltney benefited from the delay, as discussed *supra*, is 13%. Given such a rate, as well as the amount of expenditures involved and the period of benefit, Gwaltney's benefit from delaying expenditure is $54,022.[27]

b. *Gravity component.* As mentioned *supra*, in connection with chlorination problems, Gwaltney argues that the gravity component of its penalty for all its violations, including those caused by its biological treatment system, should not exceed $4,900, when adjusted. With respect to the numerous TKN violations resulting from the problems with its biological treatment system, Gwaltney argues that the great majority were utterly innocuous from an environmental standpoint because TKN is not

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[26] The Court is aware that the evidence raises some question whether Gwaltney had permanently corrected its TKN problems by May 15, 1984, even though it experienced no further violations after that date; or whether instead Gwaltney would again experience TKN violations during the coldest winter months. As indicated *supra* note 21, the Court believes that such a conclusion would be too speculative, given the present record.

[27] This amount is based on yearly compounding, computed as follows:

1982: $159,745 x .13/yr x 1 yr =	$20,767
1983: ($159,745+$20,767) x .13/yr x 1 yr =	23,467
1984: ($159,745+$20,767+$23,467) x .13/yr x .37 yr =	9,811
TOTAL:	$54,045

toxic, because the Pagan River is improving, and because most of the discharges occurred in the wintertime.

Some of its points are relevant to penalty considerations, although Gwaltney overstates its case. Gwaltney correctly points out that the presence of TKN in a river does not affect human health, according to the evidence. But it does have undeniable implications for the river's dissolved oxygen content, which is related to the environmental quality of the river.[28] While none of the evidence reflects specific environmental damage resulting from Gwaltney's TKN violations, the Court does not believe that it should blind itself to those violations as a result.

Nor does the Court believe that Gwaltney's penalty should be mitigated because the Pagan River's condition is generally improving. Gwaltney's violations may have contributed to delaying that improvement. Compliance incentives would be undermined if polluters believed that their violations would not be treated seriously where environmental regulations have generated some improvement in the environment.

The Court does recognize, however, that Gwaltney's TKN violations during the winter months posed less environmental risk than summer violations. The process by which TKN depletes the river's oxygen slows down substantially with the colder winter temperatures. Plaintiffs point out that the Pagan River's tidal nature may inhibit the flushing of TKN from the river—raising the possibility that even winter TKN discharges may lead to oxygen depletion during the warmer months. Neverthe-

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[28] Gwaltney also suggests that its TKN discharges have little effect on the environment because of the point on the Pagan River at which they occur. Testimony did indicate that the discharges are slightly down-river from a "critical point" for dissolved oxygen in a SWCB pollution model. But testimony also indicated that tidal action could nevertheless result in Gwaltney's TKN discharges affecting that critical point upriver. Further, even if Gwaltney's TKN discharges do not affect the critical point, there is no evidence that they have no potentially adverse environmental impacts on other points in the river.

less, the risk is certainly diminished. In the Court's view, fairness dictates that Gwaltney's winter TKN violations should be treated less harshly than its summer TKN violations. An appropriate penalty is $250 per day of violation for TKN violations during the months of November through April. For violations during the remaining months of the year, a penalty of $1,000 per day of TKN violation is appropriate.

c. *Adjustments.* An important factor is the willfulness involved in a compliance problem. Gwaltney concedes that it could have begun addressing the problems in its biological treatment system substantially earlier. One major delay was that Gwaltney did not contact a consultant immediately upon experiencing unexpected TKN compliance problems in the winter of 1981-82; rather, it waited until late May, 1982, to do so. Gwaltney has submitted evidence that this—and other unnecessary delays it could have prevented—totaled 283 days. The Court concludes that this number is a reasonable approximation.

Gwaltney's penalties should be adjusted upward for each day of these controllable delays, just as its penalties were adjusted upward for the controllable delays in implementing a properly functioning chlorination system. The adjustment should not be as substantial, however, because the violations resulting from the problems in the biological treatment system appear to be less serious than those resulting from the chlorination problems. Further, there do not appear to be any human health implications from the poorly functioning biological treatment system, unlike the situation with the malfunctioning chlorination system. In the Court's view, this makes the controllable delays in implementing a properly functioning biological treatment system less culpable. The Court concludes that an amount of $250 per day of delay in addressing the problems with the biological treatment system is an appropriate adjustment to the penalty.

The Court believes that Gwaltney's penalty should be adjusted downward as well as upward due to the amount of willfulness involved in the violations arising out of its biological treatment system. According to the evidence, Gwaltney's violations after starting up its new system were largely uncontrollable; there is no way to start up a biological treatment system without violations. A biological treatment system is apparently the best sort of system, overall, for a plant such as Gwaltney's. There is no evidence that Gwaltney's start-up period was greater than one would expect. The Court shall therefore account for the violations of Gwaltney's various permit limitations during its start-up period by assessing $50 per day per violation of the limitations on any substance, instead of the higher amounts discussed *supra*.

As indicated in the Court's discussion of Gwaltney's chlorination problem, Gwaltney also seeks to have its penalty adjusted downward to account for its cooperation in resolving its problems prior to litigation, and for its purported inability to pay. The Court has already rejected those arguments *supra*, and it need not address them again here.

In light of the foregoing discussion, Gwaltney's penalty for the compliance problems stemming from its biological treatment system is $289,822. Appendix B elaborates the computation of this amount.

CONCLUSION

Having determined that Gwaltney shall be assessed a civil penalty of $289,822 for violations arising out of the problems with its biological treatment system, as well as $995,500 for violations arising out of its chlorination system, the Court shall impose upon Gwaltney a total civil penalty of $1,285,322.

An appropriate order will issue.

/s/ [Illegible]
United States District Judge

Date June 26, 1985

APPENDIX A

Gwaltney's Violations of NPDES Permit No. VA0002844 (based on DMRs and stipulation of parties), from November 1, 1981 to August 31, 1984.

Month	Substance Involved and Limitation Violated								
	Total Suspended Solids (TSS)		Total Kjeldahl Nitrogen (TKN)		Fecal Coliform (FC)		Oil and Grease (O/G)	Chlorine (Cl_2)	
	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(day max.)	(day min.)	(day max.)
11/81	—	—	—	—	1	1	—	1	1
12/81	—	—	—	—	1	1	—	1	1
1/82	—	—	1	5	—	1	—	1[b]	6[a]
2/82	—	—	1	10	1	3	—	—	3
3/82	—	—	1	4	1	3	—	1	1
4/82	—	—	—	—	1	3	—	6	—
5/82	—	—	—	—	1	3	—	1[b]	[illegible]
[late May/82: Gwaltney contacts consulting firm about its TKN problems.]									
6/82	—	—	1	—	1	3	—	1	1
7/82	—	—	—	—	—	1	—	1	—
8/82	—	—	—	—	—	—	—	1	1
9/82	—	—	—	—	—	—	—	1	1
10/82	—	—	—	—	—	—	—	1	1
11/82	—	—	—	—	—	—	—	—	—
12/82	—	—	1	—	—	—	—	—	—

[1/5/83: Gwaltney submits plan for improving its biological treatment system to the State Water Control Board (SWCB).]									
1/83	—	—	1	—	—	—	—	—	—
2/83	—	—	1	4	—	—	—	—	—
3/83	—	—	1	—	—	—	—	—	—
4/83	—	—	1	—	—	—	—	—	—
5/83	—	—	1	1	—	—	—	—	—
[5/31/83: SWCB approves Gwaltney's plan.]									
6/83	—	—	—	—	—	—	—	—	—
7/83	—	—	—	—	—	—	—	—	—
8/83	—	—	—	—	—	—	—	—	—
9/83	1	—	1	—	—	—	—	—	—
10/83	—	—	1	8	—	1	—	—	—
[10/18/83: Gwaltney's new biological treatment system is completed.]									
11/83	1	1	1	10	—	—	—	—	—
12/83	1	1	1	13	1	1	—	—	—
1/84	—	—	1	9	—	—	—	—	—
2/84	—	—	—	1	—	2	3	—	—
3/84	—	—	1	—	—	—	—	—	—
4/84	—	—	1	3	—	—	—	—	—
5/84	—	—	1	1	—	—	—	—	—
7/84	—	—	—	—	—	—	—	—	—
8/84	—	—	—	—	—	—	—	—	—
TOTAL	3	2	18	69	8	23	3	16[b]	18[a]

[a] at most this number of violations of the maximum chlorine standard.

[b] at least this number of violations of the minimum chlorine standard.

APPENDIX B

Penalties for Gwaltney's violations arising from its inadequate biological treatment system.

—*economic benefit*:	$ 54,022
—*gravity component*:	
—pre-start-up TKN violations	
• winter '81-'82: 90 days x $250/day =	22,500
• summer '82: 30 days x $1,000/day =	30,000
• winter '82-'83: 151 days x $250/day =	37,750
• summer '83: 61 days x $1,000/day =	61,000
—start-up violations: (including downward adjustment because start-up is involved)	
296 days (199 days TKN, + 61 days TSS, + 33 days fecal coliform, + 3 days oil & grease) x $50/day =	14,800
	166,050
• *further adjustments*:	
• delay: 283 days x $250/day =	70,750
TOTAL:	$289,822

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed June 26, 1985]

JUDGMENT ORDER

For the reasons stated in the memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

Defendant's motion to dismiss be and the same is hereby denied.

Defendant Gwaltney of Smithfield, Ltd., is declared to have been in violation of the Clean Water Act, 33 U.S.C. § 1311 and 1342.

Defendant is mandatorily enjoined until the further order of the Court to provide plaintiffs with a copy of all reports said defendant submits to state or federal government relating to its NPDES permit. Said reports are to be submitted to plaintiffs simultaneously with each filing.

Defendant shall pay civil penalties in accord with the Court's memorandum in the sum of $1,285,322 with interest from this day forward; counsel for the respective

parties shall meet and confer within ten (10) days of this date in an effort to agree on appropriate counsel and litigation fees to be paid by the defendant to the plaintiffs. Failure to reach agreement will result in the Court's setting such fees and litigation costs as are warranted and supported by affidavits. In the event of failure to agree, appropriate affidavits should be filed with the Court no later than twenty (20) days from this date.

Let the Clerk send copies of this order and the accompanying memorandum to all counsel of record.

/s/ [Illegible]
United States District Judge

Date June 26, 1985